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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BART B. CHAMBERLAIN, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. As a matter of federal common law, may a corporate officer who received no significant distribution of corporate profits be held personally liable to make "restitution" of the entire amount of profits that the corporation earned in violation of a federal regulation (in this case, approximately $20,000,000, including prejudgment interest), merely because he played "the central role" in authorizing and supervising the corporation's acts?

2. When a trial judge has concluded as a matter of remedial discretion that the most appropriate rate of prejudgment interest is that prescribed by state law, may the court of appeals simply substitute its own judgment and impose a schedule of much higher rates?

PARTIES

Petitioners Bart B. Chamberlain, Jr., Citronelle-Mobile Gathering, Inc. ("Citronelle"), and Citmoco Services, Inc. ("Citmoco"), and respondent United States of America were the principal parties in the court below. Secretary of Energy John S. Herrington, Secretary of Commerce Malcolm Baldridge, and Donald E. Allen, formerly Regional Director, Region IV, of the Federal Energy Administration, were nominal parties below and therefore are nominal respondents here.

Chamberlain is the principal shareholder of both Citronelle and Citmoco and also of Douglas Oil Purchasing Co., Inc. Citronelle and Citmoco have no other corporate affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Bart B. Chamberlain, Jr., Citronelle-Mobile Gathering, Inc. ("Citronelle"), and Citmoco Services, Inc. ("Citmoco"), hereby petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The district court's orders of December 30, 1985 (App. B, *infra*), and February 27, 1986 (App. C, *infra*), are not officially reported. An earlier opinion of the court of appeals (App. D, *infra*) is reported at 669 F.2d 717. An earlier opinion of the district court (App. E. *infra*) is reported at 499 F. Supp. 871.

JURISDICTION

The opinion of the court of appeals is dated May 7, 1987 (the court did not issue a separate judgment). The court's order denying rehearing and suggestion of rehearing *en banc* (App. F, *infra*) was entered on June 23, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and section 211(g) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note (1980), as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 754(a)(1).

STATUTE INVOLVED

Section 209 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note (1980), as incorporated by section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 754(a)(1), provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

STATEMENT

In a shocking departure from settled law, the court of appeals ordered petitioner Bart B. Chamberlain, Jr., to pay "restitution" of approximately $20,000,000 solely

because, in his capacity as an officer of petitioners Citronelle and Citmoco, he authorized and supervised four corporate transactions that eight years later were held, by a divided panel of the court of appeals, to have violated federal regulations. The court ordered Chamberlain to make such "restitution" even though

(1) the underlying federal statute does not impose personal liability for corporate violations;

(2) it was undisputed that the traditional grounds for "piercing the corporate veil" were not present, App. A at 11a;

(3) the court of appeals implicitly acknowledged that Chamberlain personally was not guilty of any tortious conduct, *id.* at 12a;

(4) the district court had found that Chamberlain made a "good faith effort to comply with the regulations," App. E at 101a, that he had caused the corporations to "truthfully set forth all facts" relating to the transactions in submissions made to the government even before the transactions were undertaken, *id.* at 73a, and that "the transactions were conditioned upon, and made in reliance on, the opinion of reputable counsel that the transactions were not subject to price controls," App. B at 33a;

(5) the applicability of the regulations to the transactions was, as the district court observed, "an open question of law which could only be determined after the fact," *id.* at 38a, and the court of appeals actually divided 2-1 on that question, App. D at 49a-53a, 60a-64a;

(6) the transactions did not cause higher prices to the American businesses and consumers whom the regulations were meant to protect, App. B at 35a; and

(7) it was undisputed that Chamberlain had received none of the profits that the corporations realized from the transactions.

In addition, the court of appeals greatly enlarged the total amount of liability by significantly increasing the rate of prejudgment interest. The trial judge, in the exercise of his remedial discretion, had concluded that the forum's statutory rate of interest should apply, but the appellate court substituted a schedule of much higher rates.

1. *Background.* Citronelle and Citmoco are corporations engaged, *inter alia*, in the purchase, transportation, storage, and sale of crude oil. App. A at 3a. Bart Chamberlain is the president and principal shareholder of both corporations. *Id.*

In 1973 the sale of crude oil was subject to domestic price controls. By regulation, however, "export sales" were exempt from those controls. *See* 10 C.F.R. § 212.53 (a) (1975). Late in that year, Edward S. Carey, the president of Grand Bahamas Petroleum Company ("Petco"), a foreign corporation operating a refinery in the Bahamas, approached Chamberlain with the suggestion that Citronelle or Citmoco, which had access to crude oil produced from the Citronelle field in Alabama, sell approximately one million barrels of crude oil to Petco in the Bahamas at a price higher than would be allowed in a purely domestic sale. App. E at 72a, 76a.

Chamberlain agreed to this proposal on behalf of Citronelle and Citmoco, subject to two conditions: *first*, that outside counsel determine that the transactions would be exempt from price controls and furnish a legal opinion to that effect, and *second*, that the Department of Commerce issue the necessary export licenses. S.R. 344, 448.[1] After reviewing the facts relating to the

[1] "S.R." refers to the Stipulated Record filed in the court of appeals.

proposed transactions, counsel furnished a written opinion that the transactions would be exempt from domestic price controls as "export sales." App. B at 33a. The corporations then applied to the Commerce Department for export licenses; the applications fully disclosed all relevant information, including price. App. E at 73a, 101a.[2]

The Commerce Department sought the advice of the Federal Energy Office ("FEO"), which was responsible for administering the domestic price controls, and FEO advised that it could see no legal basis for denying the corporations' applications. S.R. 413, 576. The Commerce Department issued the requested export licenses. App. E at 73a. Pursuant to the licenses, Citronelle and Citmoco shipped approximately 960,000 barrels of crude oil to Petco in the Bahamas at the price Petco had agreed to pay. *Id.* There were four shipments in all. *Id.*

The contemporaneous view at the Commerce Department and FEO was that these export transactions were "legal, but not politically acceptable." S.R. 349. *See also* S.R. 576. Consequently, the Commerce Department promptly amended its regulations prospectively to restrict the issuance of export licenses for crude oil to situations in which no domestic refiner was willing to take delivery, *see* 39 Fed. Reg. 15114 (May 1, 1974)—a condition that effectively precluded any further exportation of crude oil during the period of price controls.

2. *Initial proceedings in the district court.* More than four years later, in November, 1978, the United States

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[2] At the time, export licenses could be issued only upon a showing that there would be no adverse effect on "the total quantity or quality of petroleum available to domestic users." 15 C.F.R. § 377.6(b)(i); 38 Fed. Reg. 34442, 34443 (Dec. 13, 1973). Accordingly, Petco represented to the Commerce Department that, if permitted to purchase the crude oil, it would in turn export a like quantity of petroleum products into the United States. App. E at 73a.

filed claims in the United States District Court for the Southern District of Alabama for restitution and penalties against Citronelle and Citmoco and also against Chamberlain individually.[3] The claims were asserted under section 209 of the Economic Stabilization Act of 1970 ("ESA"), *as amended*, 12 U.S.C. § 1904 note (1980), which allows a court to order "restitution of moneys received" in violation of the price controls. The government's theory was that, despite its contemporaneous approval of the transactions, the sales of crude oil to Petco in the Bahamas were not "export sales" and therefore had been in violation of domestic price controls. On summary judgment, the district court (Judge Pittman) agreed and held the two corporations liable to make "restitution" in an amount subsequently to be determined.

On the question of personal liability, the district court reasoned that "Chamberlain was a central figure in the sales of crude oil by [Citronelle and Citmoco]. He is therefore subject to liability for any violations of the [price controls] in those sales." App. E at 88a. But the court concluded that "[b]ecause restitution is predicated upon a finding of unjust enrichment, . . . Chamberlain would be individually liable only to the extent that he received proceeds from those sales." *Id.*[4]

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[3] These were counterclaims in a suit brought by Citronelle, Citmoco, and Chamberlain for declaratory and equitable relief against the Department of Commerce and FEO's successor agency, the Federal Energy Administration.

[4] Chamberlain had not received any share of the corporations' profits, but the parties stipulated that he had received an after-tax gain of approximately $50,000 from his own sale to Citronelle of a small portion of the crude oil Citronelle later resold to Petco. App. B at 39a; App. C at 44a. Chamberlain had sold the crude oil to Citronelle in his capacity as an owner of an undivided interest in production from the Citronelle field. *See* S.R. 1081-84. He received the same price that Citronelle paid to other owners. *Id.*

The court rejected the government's demand for penalties under section 208 of the ESA, which authorized a fine of up to $5,000 for each willful violation of the price controls. The court explained that

> the defendants sought the advice of counsel before proceeding with their transactions. The defendants made a good faith effort to comply with the regulations, and clearly and fully explained their transactions to the Department of Commerce.
>
> It is clear that any violation proceeded from the inexperience of the agencies in administering the new regulations . . . . The regulations contained no examples which might have alerted the defendants that [the transactions were not exempt from price controls].

App. E at 101a-102a.

3. *Interlocutory appeal.* An interlocutory appeal was certified pursuant to 28 U.S.C. § 1292(b), focusing principally on the question of the scope of the regulatory exemption for "export sales." A divided panel affirmed. The majority asserted "that these transactions had precisely the effect which Congress sought to avoid in enacting the Emergency Petroleum Allocation Act of 1973 (EPAA), to wit; higher oil prices to American buyers." App. D at 51a. In dissent, Judge Pointer explained that "[w]hile the imposition of price controls on these transactions might now appear to have been appropriate as a matter of policy, the regulations in place at the time the sales were contemplated and consummated did not limit the prices that PETCO might be charged, a conclusion which government officials had consistently, if begrudgingly, acknowledged prior to filing of the amended counterclaim in the present litigation in 1978." *Id.* at 60a.

4. *Proceedings on remand.* On remand, the district court (Judge Alaimo) conducted a hearing to determine who had been injured and the amount of unjust enrich-

ment. App. B at 33a. The court determined that the government had "failed to produce a scintilla of evidence to support its claim that the overcharges were . . . passed on to American companies or ultimate consumers." *Id.* at 35a. Instead, the court found, Petco and its corporate parent had not been able to pass on the overcharges because their selling prices had been "locked in by contract irrespective of the acquisition cost." *Id.*

The district court noted that "whether the PETCO transactions were valid 'export sales' [had been] an open question of law which could only be determined after the fact," App. B at 38a, and found that the resulting regulatory violation was simply "an honest mistake." *Id.* The court further found that

> the violations in questions were not willful. Having sought advice of counsel before proceeding with the PETCO sales, defendants made a good faith effort to comply with the pricing regulations and fully explained the proposed transactions to Government officials when applying for export licenses. Indeed, it appears that any fault lies as much with DOE officials who were inexperienced in administering the new regulations as it does with the Citronelle companies.

Id. at 37a-38a.

In light of these circumstances the district court held Citronelle and Citmoco liable to pay restitution in the amount of their after-tax profits from the overcharges—approximately $3,400,000, plus interest. App. B at 39a. The court reasoned that "that sum effectively strips defendants of their ill-gotten gains without penalizing them unduly for an honest error." *Id.* The court expressly "decline[d] to reconsider whether Chamberlain could be held personally liable for the $3.4 million awarded against his companies." *Id.* Instead, Chamberlain's per-

sonal liability was fixed at the amount of his after-tax gain from the sale of his own crude oil to Citronelle—approximately $50,000, plus interest. App. C at 44a.

The district court determined "in its discretion . . . that the proper rate to be used in calculating prejudgment interest is the rate set out in Ala. Code § 8-8-8 (1975). Such rate has at all times from 1974 until the present been six percent (6%), compounded annually." App. C at 44a.

5. *The second appeal.* Despite the equitable nature of the relief granted, the court of appeals overturned the district court's determinations and substituted its own judgment with respect to both the extent of Chamberlain's liability to make "restitution" and the appropriate rate of prejudgment interest.[5]

There had been no finding or even allegation that Citronelle and Citmoco had been "inadequately capitalized, that [they were] a mere alter ego of Chamberlain, that the corporate form is being used to perpetrate a fraud, or that [the corporations] have failed to comply with corporate formalities." App. A at 11a. The court of appeals therefore acknowledged that the facts did not support "the traditional rationale for piercing the corporate veil." *Id.* The court reasoned, however, that because "Chamberlain authorized and conducted the very negotiations leading to the violations for which the corporations are now liable . . . [his] conduct constitutes actual participation in the wrongful acts." *Id.* at 15a-16a.

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[5] The court had been asked to reconsider the prior panel's holding with respect to the scope of the exemption for "export sales," on the ground that the district court's finding that there was no evidence of injury to American businesses and consumers undercut the earlier panel's rationale that the transactions had caused higher oil prices to American buyers. The court of appeals refused to reconsider, asserting that it was not necessary for the government to prove that anyone had been injured. App. A at 10a.

The court of appeals brushed aside the findings of both trial judges that Chamberlain had acted in good faith, asserting that those findings gave "no instruction on whether the Chamberlain Group intended their effort to comply with the *spirit* of the price control laws and regulations." App. A at 14a (emphasis added). The court also dismissed the finding that Chamberlain had acted on the advice of counsel, stating that "counsel's view of the law [need not] be the law of the Court" and that "Chamberlain's deference to counsel [does not] excuse[] what amounts to acting in disregard of the crude oil pricing regulations." *Id.* at 16a.

The court held, moreover, that Chamberlain's personal liability would not be limited, as section 209 of the ESA prescribes, to "restitution of moneys received." The court acknowledged that "[o]rdinarily, the measure of restitution is the amount of enrichment received." App. A at 18a (quoting *Restatement of Restitution* § 1 comment a (1937)). Nevertheless, the court postulated that, in order to "restore the status quo," a corporate officer who was the "animating force" behind the corporation's acts may be held personally responsible for making restitution of the entire amount received by the corporation, even though he did not personally receive that amount himself. *Id.* Consequently, the court made Chamberlain jointly and severally liable with the two corporations "on the strength of a 'central figure' theory of liability." *Id.* at 13a.

The court also substituted its own judgment for that of the trial judge concerning the proper rate of prejudgment interest. The court acknowledged that "state law may be used as a guide for a court exercising its discretion" in setting the rate of prejudgment interest, App. A at 25a, but it nevertheless set aside the trial judge's decision to apply the local statutory rate. Instead,

the court of appeals imposed a schedule of much higher rates, ranging to above 20 percent. *Id.* at 25a, 28a.[6]

6. *Consequences of the decision below.* Citronelle and Citmoco used the bulk of the after-tax proceeds from their sales to Petco, as they had advised the Commerce Department they would do, in efforts to discover and develop additional reserves of crude oil. *See* S.R. 576. Those efforts were unsuccessful. The combined fair market value of the two corporations' assets now is less than $5,000,000. Therefore, even if the government first seizes all of the corporations' assets, under the decision below Chamberlain will be personally liable to provide some $15,000,000 as "restitution" for the corporations' adjudicated overcharges—overcharges that, as the district court found, caused no injury to the American businesses and consumers that the price controls were designed to protect.

REASONS FOR GRANTING REVIEW

The decision below has grave and disturbing implications for corporate managers generally and especially for anyone who has ever exercised managerial control over the affairs of a closely held corporation. It stands for

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[6] The court also substantially increased the total amount of liability by fixing restitution at the amount of before-tax gross profits rather than the amount of after-tax net profits that the district court had found to be the appropriate measure under the circumstances. App. A at 20a-24a. The court reasoned that "the subtraction of taxes precludes the award of an amount which would make victims whole." App. A at 22a. But the district court found that the only "victims" were Petco and its corporate parent, App. B at 35a, and the prior panel of the court of appeals determined that Petco and its parent are barred from recovery because of their "unclean hands." App. D at 57a.

In fact, the recovery appears ultimately destined for the United States Treasury. The court directed that the recovered funds be distributed pursuant to 10 C.F.R. Part 205, subpart V (1986). App. A at 26a. Under those regulations, the funds will be paid into the Treasury if no injured claimants are identified. 10 C.F.R. § 205.287(c) (1986). *See also* 50 Fed. Reg. 27400 (July 2, 1985).

the proposition that whenever a corporation misconstrues and thereby violates a federal statute or regulation, the corporate officer or employee who played "the central role" in authorizing and supervising the corporation's acts may be subjected to ruinous personal liability as a matter of federal common law. This is so, moreover, regardless of how diligent the officer or employee may have been in attempting to ensure the corporation's regulatory compliance.

The potential application of this "central figure" theory of personal liability to officers of closely held corporations poses a particularly serious threat to small businesses and to the vital sector of the economy that they represent. Now that the government has succeeded in persuading one appellate court to adopt and apply this novel theory, there is every reason to believe that the government will invoke the theory in other enforcement contexts as well. Private litigants, too, can be expected to press this "central figure" theory in actions based upon claimed corporate violations of federal law. The decision below thus threatens severe and widespread erosion of the protection historically afforded by the principle of limited liability.

The lower court's holding on the issue of personal liability marks a radical departure from settled precepts of American corporate law and from federal common law as it has been applied by this Court and in the other circuits. In addition, the decision below squarely conflicts with decisions in other circuits concerning the proper scope of appellate review of a district court's determination of the applicable rate of prejudgment interest. This Court should grant review to resolve these conflicts on important issues of federal law.

1. *The court of appeals has grossly distorted federal common law as it relates to the personal liability of corporate officers and employees.* The hallmark of American corporate law is the principle of limited liability, which

permits businessmen to embark upon new or expanded ventures without incurring the risk of personal financial ruin. Limited liability "is fundamental to the very concept of the corporation as a separate legal entity. Around it the entire body of corporation law is built. It is . . . ingrained in our legal and economic systems." *Lowendahl v. Baltimore & Ohio R.R.*, 287 N.Y.S. 62, 72 (App. Div.), *aff'd*, 272 N.Y. 360 (1936). *See also, e.g., Connors v. P & M Coal Co.*, 801 F.2d 1373, 1377 (D.C. Cir. 1986) ("the principle of limited liability is . . . fundamental to our corporate law"); *Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973) ("[l]imited liability is one of the principal purposes for which the law has created the corporation"). The decision below goes a long way toward nullifying this essential principle of corporate law.

Historically, the principle of limited liability has applied, in somewhat different ways, both to shareholders and to directors, officers, and employees. At common law, shareholders may be held liable for the acts or obligations of their corporation only if their abuse of the corporate form or misuse or misappropriation of corporate property justifies disregarding the corporation as a separate legal entity. Both the government and the court of appeals correctly acknowledged, however, that the facts of this case do not supply "the traditional rationale for piercing the corporate veil." App. A at 11a. Consequently, the court chose "to focus on Chamberlain the actor, rather than Chamberlain the owner." *Id.* In doing so, however, the court failed to observe that at common law individuals who act on behalf of a corporation are subject to liability only if their own conduct is independently actionable.

At common law, a corporate officer or employee may be held personally liable for causing or participating in the corporation's commission of a tort.[7] But as a corollary, a

[7] This rule of "tortious conduct" was applied in three of the cases from other circuits upon which the court below relied. *See*

corporate officer or employee who has not committed a tort may not be held liable for the acts or obligations of the corporation merely because, in his capacity as an agent, he caused or assisted the corporation to take those acts or assume those obligations. *See generally* Annotation, *Personal Liability of Corporate Directors or Officers to Third Persons for Restitution, or for Damages for Conversion, under Circumstances Rendering the Corporation Itself Liable*, 152 A.L.R. 696 (1944). In the days before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court accepted and applied that corollary as a matter of federal common law. *See Loring v. Frue*, 104 U.S. 223, 226 (1881). More recent decisions continue to observe and apply the distinction between a corporate officer's tortious conduct, which gives rise to personal liability, and his nontortious conduct, which does not. *See, e.g., Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Lobato v. Pay Less Drug Stores*, 261 F.2d 406, 408-09 (10th Cir. 1958).

The typical economic regulation does not codify a common law duty.[8] It follows that a corporate agent does not commit a tort when he causes the corporation to com-

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App. A at 14a-15a. In *LCL Theatres v. Columbia Pictures Industries*, 619 F.2d 455, 456 (5th Cir. 1980), the corporate officer had "fraudulently underreported box office receipts." In *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978), the corporate officer had participated in "acts of unfair competition" and was held personally liable because a "corporate officer is individually liable for the torts he personally commits." And in *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1143 (4th Cir. 1975), the lawsuit also had been brought "for the redress of a tort." In the fourth (and last) case from another circuit upon which the court below relied, *United States v. Pollution Abatement Services*, 763 F.2d 133 (2d Cir.), *cert. denied*, 106 S. Ct. 605 (1985), the governing statute expressly authorized personal liability. *See id.* at 135.

[8] In particular, the Department of Energy has recognized that "violations of DOE regulations are not traditional torts." *RBF Petroleum, Inc.*, 12 DOE (CCH) ¶ 82,529, 85,136 n.6 (Aug. 21, 1984).

mit a nonwillful violation of such a regulation. Such conduct by a corporate agent, therefore, is independently actionable only if it is made so by statute. Because of this, other circuits have concluded, as a matter of federal common law, that corporate officers or employees may not be held personally liable for causing a corporation to commit regulatory violations "unless either the [statute] itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form." *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300 (5th Cir. 1976). *See also, e.g., Solomon v. Klein*, 770 F.2d 352, 354 (3d Cir. 1985).[9] Applying that rule, the federal courts rejected efforts to make corporate officers or employees liable for corporate overcharges under earlier price control programs. *See Auditor of Public Accounts v. Izatt*, 205 F.2d 785, 788 (7th Cir. 1953).

In short, the accepted notion of federal common law is that "[p]ersonal financial responsibility may not be imputed to owner-officers simply because of the size of their ownership or the extent of their control over their company's affairs." *Connors v. P & M Coal Co.*, 801 F.2d at 1377. The court below, however, imposed personal liability on Chamberlain merely because he exercised control. According to the court, personal liability can attach whenever a corporate officer or employee acts as the "central figure" in authorizing and directing a corporate transaction that later is found to have violated a federal statute or regulation. The court apparently borrowed the term "central figure" from the phrase "central figure in tortious conduct." *See* App. E at 88a. But by eliminating the element of tortiousness, the court eliminated the very basis for personal liability. "Whatever the exact scope of the [tortious conduct] rule, it clearly requires that the elements of an actionable tort be made out." *Martin v. Pilot Industries*, 632 F.2d 271, 277 (4th Cir. 1980).

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[9] Federal common law establishes the standard for piercing the corporate veil in non-diversity cases. *See, e.g., United States v. Pisani*, 646 F.2d 83, 87-88 (3d Cir. 1981); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981).

The decision below represents an enormous expansion of potential personal liability. A corporation can act only through its agents, and it is typical for one corporate officer to be the "central figure" in authorizing, supervising, or directing any particular corporate act. Thus, the decision below means that for virtually every corporate violation, no matter how unintentional, some corporate officer or employee may be held personally and ruinously liable, no matter how hard he tried to ensure that the corporation was acting within the law.

The court of appeals did not even attempt to justify this result under the governing statute, and for good reasons. Section 209 of the ESA allows a court to order only "restitution of moneys received." This arguably permits the imposition of liability not only on the corporate violator but also on its transferee to the extent of moneys actually transferred and received; but the statute by its terms plainly does not authorize the imposition of personal liability on a corporate officer who, like Bart Chamberlain, was not a transferee or recipient of the moneys he is being asked to repay.

Here, as elsewhere, there is "nothing to suggest that Congress intended to subject owner-operators of a closely-held corporation to personal liability merely because they actively participated in running the business." *Connors v. P & M Coal Co.*, 801 F.2d at 1376. Indeed, both the statutory text and the legislative history suggest that Congress had the opposite intent. In 1975, Congress amended the statute to impose penalties (limited to a maximum of $40,000 per violation) on any corporate director, officer, or agent who "knowingly and willfully authorizes" a violation of the price controls. 15 U.S.C. § 754(a)(4) (1976). The accompanying Conference Report stressed that, with the exception of that provision, "nothing . . . is intended to change existing case law relating to the individual responsibility of corporate directors, officers or agents for violations of those corporations." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 200,

reprinted in 1975 U.S. Code Cong. & Admin. News 1956, 2042. Congress thereby sought to discourage any departure from previously established common law standards. Congress certainly never approved the *in terrorem* device of unlimited personal liability for corporate violations.[10]

Presumably in recognition that it was venturing into uncharted territory, the court of appeals tried in two ways to suggest restraints on its theory of "central figure" personal liability. *First*, the court repeatedly characterized Chamberlain's actions on behalf of Citronelle and Citmoco as "wrongful." *E.g.*, App. A at 11a, 16a. But that characterization was just an empty rhetorical device. Chamberlain's actions on behalf of the corporations did not violate any federal regulation. The only "wrongful" acts were Citronelle's and Citmoco's sales of crude oil to Petco. It was the corporations' sales, not Chamberlain's efforts on behalf of the corporations, that violated the price controls.

Second, the court of appeals asserted that courts have discretion "to condition a finding of personal liability on the particular circumstances and equities of each case." App. A at 15a. But if personal liability for corporate regulatory violations is to be a matter of equitable discretion, such discretion must, in the first instance, be exercised by the trial judge. Only where that discretion has been abused should an appellate court have the right to overturn. Here, two trial judges had found, for an abundance of reasons, that joint and several personal liability was inappropriate. The court of appeals did not determine that the district court's findings were erroneous or that there had been an abuse of discretion. In-

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[10] In an earlier case, the court below rejected an assertion of personal liability against a closely held corporation's president and principal shareholder, explaining that "[t]he EPAA and the regulations promulgated thereunder were not passed in a vacuum. They in no way derogate the general rule that stockholders are immune from corporate obligations." *Johnson Oil Co. v. DOE*, 690 F.2d 191, 202 (TECA 1982).

stead, it simply substituted its own judgment for that of the trial judges. Because the court of appeals never explained what made Chamberlain's conduct more blameworthy than the trial judges had found it to be, its invocation of the "particular circumstances and equities" appears to be little more than a charade. If personal liability can be imposed in this case, it can be imposed in any case.[11]

2. *The court of appeals ignored the established law of restitution by imposing liability for moneys never received.* The essential nature of a claim for restitution is that "the defendant is liable for the gains he has made in the transaction, or what is now called his unjust enrichment." D. Dodd, *Remedies* § 4.1 at 224 (1973); *see Restatement of Restitution* §§ 1, 3 (1937) (restitution is required where a person "has been unjustly enriched at the expense of another" or where a person has "profit[ed] by his own wrong at the expense of another"). Restitution aims "at forcing the defendant to disgorge benefits that it would be unjust for him to keep." D. Dodd, *Remedies, supra,* § 4.1 at 224.

Congress did not disturb this traditional view of restitution when it enacted the ESA. That statute put in place a hierarchy of sanctions and remedies: (1) section 208 of the ESA imposed both criminal fines ($5,000 per "willful" violation) and civil penalties ($2,500 per violation);[12] (2) section 210 provides a private action for damages; and (3) section 209 grants authority for judicial enforcement through the exercise of injunctive and other equitable powers, including the "restitution of

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[11] That is precisely the reading the Department of Energy already has given the decision below in imposing personal liability on other corporate officers. *See Cougar Oil Marketers,* Case No. HRO-0262, slip op. at 25 (DOE/OHA June 24, 1987) ("the doctrine of immunity for corporate officers and shareholders . . . clearly is outweighed by the equities favoring enforcement of the DOE regulations").

[12] These sanctions were later replaced by the higher monetary penalties imposed by 15 U.S.C. § 754(a).

moneys received." The latter provision reflects black-letter law: "In an action for restitution in which the benefit received was money, the measure of recovery for this benefit is *the amount of money received.*" *Restatement of Restitution* § 150 (emphasis added). The trial judge appropriately ruled within this hierarchy of statutory remedies: no private action for damages had been brought; the court found that there was no basis for assessing fines or penalties; and the court concluded that it should exercise its equitable power to order each defendant to make restitution only of the moneys that defendant actually had received.

The court of appeals chose to overturn the district court based on the misapplication of a quotation from the commentary in the *Restatement* and by building upon its own misdirected precedent. The comment in the *Restatement* upon which the court relied, App. A at 18a, addresses the situation in which someone has innocently obtained possession of property unjustly taken from another. In that instance, the innocent possessor of the property, even though he had not been unjustly enriched, might be obliged to return it to the person from whom it had been unjustly obtained. But nowhere does the *Restatement* suggest that restitution will run against someone who never received the money or goods unjustly taken from another.

The ruling below creates a new and profoundly different law of restitution. The court has totally ignored the traditionally important role of the trial judge in fashioning and applying equitable remedies. *See, e.g., United States v. Bedford Associates*, 713 F.2d 895, 902 (2d Cir. 1983) ("restitution is an equitable remedy resting in the sound discretion of the trial court"). And the court's decision places federal common law in direct conflict with the universal understanding of "restitution." *See Restatement of the Law (Second) Restitution* § 1 at 14 (Tent. Draft No. 1, 1983) ("[a]ccountability for benefit received is a core characteristic of restitution law"). The court's

ruling also does violence to the statutory hierarchy of remedies Congress established: it effectively makes Chamberlain liable for a $20,000,000 "penalty" or judgment for "damages" when no damage claim was pending and the trial judge had decided that no penalties should be imposed.[13]

3. *The appellate court's rejection of the district court's use of the forum rate of prejudgment interest, and its substitution of a schedule of much higher rates, squarely conflicts with the decisions of other circuits.* Because a trial judge is much closer to the parties, witnesses, evidence and facts of a case and thereby is better situated to evaluate the equities, it has become hornbook law that "[t]he award of pre-judgment interest in a case under federal law is a matter left to the sound discretion of the trial court." *United States v. California State Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982). *See also, e.g., Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984); *EEOC v. Wooster Brush Co. Employees Relief Association*, 727 F.2d 566, 579 (6th Cir. 1984); *Whorton v. Home Insurance Co.*, 724 F.2d 427, 431 (4th Cir. 1984). A decision with respect to prejudgment interest therefore "will be upheld unless the district court abuses its discretion." *EEOC v. Rath Packing Co.*, 787 F.2d 318, 333 (8th Cir.), *cert. denied*, 107 S. Ct. 307 (1986).

The district court below acted well within the permissible range of choice by applying the local statutory rate

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[13] There is a sad irony here. The maximum penalty that could have been imposed under section 208 was $20,000 ($5,000 for each of four shipments). The trial judge refused to impose any penalty, because he found that Chamberlain had acted in good faith. App. E at 101a. The court of appeals, asserting that the finding of good faith was irrelevant to the issue of restitution, App. A at 22a, effectively caused a thousandfold magnification of the maximum penalty and imposed that enormously swollen penalty under the guise of ordering "restitution."

of six percent. This case is indistinguishable in that respect from *United States v. The M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir. 1979). There, as here, the district court had fixed prejudgment interest at the local statutory rate of six percent. And there, as here, the government on appeal argued that the court should have awarded interest at the much higher commercial rates in effect at the time. At that point, however, the two cases proceed in opposite directions. The First Circuit expressly rejected the government's request that higher rates of interest be substituted on appeal:

> While a federal court is not bound by the forum's local rate of interest, it is well established that it may use the law of the forum as its guide. *The United States has not cited us to a single case in which a district court was reversed for refusing to award interest above the forum rate, and we decline to do so here.* Its argument that a rate of six per cent is unrealistically low in today's money market and therefore that it is "arbitrary for courts to follow such arbitrary rates" proves too much, for it seemingly would invalidate every award of interest guided by a forum rate.

Id. at 14 (emphasis added and citation omitted). The decision below squarely conflicts with *The M/V Zoe Colocotroni* and indeed appears to represent the very first time a federal appellate court has reversed a district court for using the forum state's rate of prejudgment interest.

The court of appeals simply substituted its judgment for that of the district court, asserting that the trial judge had "neglected to offer a reason for choosing the 6% rate applicable to state court judgments." App. A at 24a. In fact, the district court's orders were rife with references to equitable considerations that supported its rejection of the high commercial rates sought by the government. In particular, no injured purchasers needed to be compensated for the loss of the use of funds, App. B

at 35a, 38a; the government had permitted interest to accrue for more than four years before bringing suit, *id.* at 38a-39a; and the government itself had been at fault in permitting the transactions to go forward in the first place, *id.* at 38a. In similar circumstances, other circuits have not asked district courts to state their reasons more explicitly. *See, e.g., Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc.*, 755 F.2d 87, 94 (7th Cir. 1985); *Earnhardt v. Puerto Rico*, 744 F.2d 1, 3 (1st Cir. 1984).

In any event, the established rule in other circuits is that even if a district court has inadequately explained its choice of the rate of prejudgment interest, the appellate court nevertheless does not "substitute [its] judgment for that of the district court in reconciling [the] competing interests." *EEOC v. Rath Packing Co.*, 787 F.2d at 334. Instead, the reviewing court vacates and remands for further consideration or a fuller explanation. *See, e.g., Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 795 (9th Cir. 1986); *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190, 1202-03 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Ameejee Valeejee & Sons v. M/V Victoria U.*, 661 F.2d 310, 313-14 (4th Cir. 1981). In this way, the other courts of appeals ensure that an award of prejudgment interest genuinely represents the trial judge's exercise of remedial discretion.

Thus, the decision below with respect to prejudgment interest creates two levels of conflict with the other circuits. The court of appeals departed from precedent by refusing to accept the trial judge's determination, because the judge had not abused his discretion. But having disagreed with the trial judge, the appellate court further departed from precedent by failing to remand.[14]

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[14] There was no factual basis in the record for the appellate court's assertion that its "interest schedule more realistically reflects the full value of money retained." App. A at 25a. On remand,

4. *The issues here are important and recurrent; this Court should act to ensure that, with respect to issues such as these, even a specialized court of appeals is made to conform to general standards of federal law.* The issues here, and especially the question of personal liability for corporate regulatory violations, are of great importance to all corporate managers charged with responsibility for federal regulatory compliance. And the decision below has immediate and particular importance for officers and employes of corporations in the petroleum industry. We have been advised by the Department of Energy ("DOE") that there are approximately 300 cases currently pending before DOE's Office of Hearings and Appeals ("OHA"), the Federal Energy Regulatory Commission, and the federal courts involving alleged violations of the price controls applicable to that industry. Virtually all of these cases involve alleged corporate violations and therefore may give rise to personal liability on the "central figure" theory applied in this case. Indeed, OHA seized upon the decision below as a basis for imposing personal liability on corporate officers in no less than three separate cases within just one week after the denial of rehearing below. *Cougar Oil Marketers, Inc.*, Case No. HRO-0262 (OHA/DOE June 24, 1987); *Petroleum Carrier Co., Inc.*, Case No. HRO-228 (OHA/DOE June 26, 1987); *National Hydrocarbons Group, Inc.*, Case No. HRO-0164 (OHA/DOE June 30, 1987).[15] There are approximately one hun-

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the trial judge could have further considered, as one of the relevant factors bearing upon the appropriate rate of prejudgment interest, the factual issue of the value of the retained funds to the corporations.

[15] Personal liability was imposed in *Cougar Oil Marketers* solely because the corporate officer in question had

> signed most contracts and arranged most of the financial transactions relating to Cougar's purchases and sales of crude oil. He conducted, directed, dominated and controlled the Company's business activities and was the central figure

dred potentially similar enforcement cases still pending before OHA alone. This large body of cases creates the specter of a major industry, and of the corporate officers and employees within that industry, being unfairly victimized by the erroneous holding of the court below, no matter what the other federal courts of appeals may think about the "central figure" theory of personal liability.

This case presents the most insidious form of conflict among the circuits. The petitioners have been treated differently from other similarly situated litigants not because they live in a different geographical area but because they are engaged in a business that has been placed under the jurisdiction of a different court, the Temporary Emergency Court of Appeals ("TECA"). The establishment of specialized courts of appeals carries with it the risk that such courts will develop and apply nonconforming rules of law.[16] When this occurs, litigants subject to the jurisdiction of such courts come to be treated differently, and very unfairly so, from litigants before other courts of appeals. That is what has happened in this case. TECA has applied rules with respect to personal liability and prejudgment interest that bear no relationship to those that govern litigation in other circuits.

This Court should supervise the specialized courts of appeals and protect the litigants subject to the jurisdiction of such courts from the application of rules that are not sanctioned by usage anywhere else. Where, as here,

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in authorizing and approving the purchases and sales of crude oil.

Slip op. 24. The other two cases were similar.

[16] According to a law professor who formerly litigated price control cases on the government's behalf, "TECA has developed an 'institutional bias' in favor of agency policy and has become 'caught up in the agency's mission as its reason for being and basis for succeeding.'" Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L.J. 113, 151.

the issues themselves manifestly are important, the Court should grant review to ensure that fundamental principles of federal common law and appellate review are applied fairly and evenhandedly by all the circuits and not just by those whose jurisdictions are geographically delimited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1987.

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APPENDICES

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 11-7 and 11-8

CITRONELLE-MOBILE GATHERING, INC., et al.,
PLAINTIFFS/COUNTERCLAIM-DEFENDANTS,
APPELLEES AND CROSS-APPELLANTS,

v.

JOHN S. HERRINGTON, et al.,
DEFENDANTS, APPELLANTS AND CROSS-APPELLEES,

and

UNITED STATES,
COUNTERCLAIMANT, APPELLANT AND CROSS-APPELLEE.

On Appeal from the United States District Court
For the Southern District of Alabama
(District Court No. 77-101)

ANTHONY A. ALAIMO, *Chief Judge*
Southern District of Georgia, sitting by designation

(Argued: October 17, 1986 Decided: May 7, 1987)

Before GIGNOUX, GRANT, and PECK, Judges.

GRANT, Judge.

This action was initially filed by Citronelle-Mobile Gathering, Inc., and others (hereinafter referred to as the Chamberlain Group), seeking declaratory and injunctive relief against officials of the Federal Energy Administration, now the Department of Energy (DOE), and the Secretary of the Department of Commerce, to establish plaintiffs' legal rights with respect to four sales of crude oil made between December 1973 and April 1974.

The Government counterclaimed, seeking to compel Bart B. Chamberlain (Chamberlain), Citronelle-Mobile Gathering, Inc. (Gathering), and Citmoco Services, Inc. (Services), to make restitution of alleged overcharges received as a result of the four transfers of crude oil to the Grand Bahamas Petroleum Company, Ltd. (PETCO), a Bahamian corporation, and a wholly-owned subsidiary of an American firm, New England Petroleum Corporation (NEPCO).

The first three shipments of crude oil were sold at a price of $14.00 per barrel, and the fourth and final shipment at $13.00 per barrel, prices admittedly higher than the price the Chamberlain Group could lawfully have charged had the sales been made in the United States to United States purchasers. The Chamberlain Group, however, contended that these shipments were "export sales" excluded from domestic petroleum pricing regulations.

The counterclaimant sought to compel the Chamberlain Group to make restitution of these alleged overcharges by paying into an escrow account, for subsequent disbursement to appropriate persons, a portion of the revenues they received from the sale of the crude oil, represented by the difference between the payments actually received and the maximum lawful selling price allowed by the Economic Stabilization Act of 1970 (ESA), as amended, 12 U.S.C. § 1904 note; the Emer-

gency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751, *et seq.*; and the regulations promulgated thereunder which established the ceiling price for the resale of domestic crude oil. *See* 6 C.F.R. Part 150 and 10 C.F.R. Part 212.

We have jurisdiction under Section 502 of the Department of Energy Organization Act (DOE Act), 42 U.S.C. § 7192; §§ 208, 209 and 211 of the Economic Stabilization Act (ESA), 12 U.S.C. §§ 1904 note and 1906, as incorporated in § 5(a) of the Emergency Petroleum Act (EPAA), 15 U.S.C. § 754(a), and Section 208 of the ESA, 12 U.S.C. § 1905. Venue is proper in accordance with 28 U.S.C. § 1391(a).

The Parties

Bart B. Chamberlain is a citizen and resident of the State of Alabama. He is President, a director, and ninety (90) percent stockholder of counterclaimant-defendant Gathering, and President, a director, and eighty-seven and a half (87.5) percent stockholder of counterclaimant-defendant Services. Chamberlain is also the owner of certain crude oil produced from the Citronelle Field located in Mobile County, Alabama.

Gathering is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Alabama. Gathering is engaged in the business of purchasing crude oil produced from the Citronelle Field in Mobile County, Alabama. Gathering is also engaged in the transportation and resale of such crude oil.

Services is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Alabama. Services is engaged in the business of storage of crude oil purchased, transported, and sold by counterclaimant-defendant Gathering.

Services also made one transfer of crude oil on or about May 26, 1974.

Counterclaimant is the United States of America, suing on behalf of the DOE, which assumed the powers and functions of the Federal Energy Administration (FEA) on October 1, 1977.

Background

In December 1973, at the height of the Arab oil embargo, and soon after the enactment of the Emergency Petroleum Allocation Act (EPAA), Chamberlain met with Edward M. Carey, Sr. in New York City. According to the testimony of Chamberlain, they reached an agreement by which Chamberlain would sell Carey three cargoes of oil, initially at $14.00 per barrel. As a result of this agreement, Chamberlain's companies made four shipments of crude oil totaling nearly a million barrels to PETCO, the wholly-owned Bahamian subsidiary of the American corporation NEPCO, which was controlled by Carey. (A fuller factual background is found in the earlier published opinions of *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871 (S.D. Ala. 1980), and *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982).)

Newly promulgated export license regulations of the Department of Commerce required the Chamberlain Group to establish that the total quantity or quality of petroleum available to the United States would not be diminished. 15 C.F.R. § 377.6(b)(1). To satisfy that requirement, the Chamberlain Group certified that the Citronelle crude oil "will be processed in the [Bahamian] refinery into various petroleum products, all of which will be purchased by NEPCO and exported from the Bahamas to the United States of America." *Citronelle-Mobile*, 499 F. Supp. at 877. The refinery is partially owned by the Carey companies.

The first three export licenses were granted in routine fashion, but the fourth application, while originally denied, was reviewed by a newly organized Petroleum Products Exceptions Committee, consisting of officials from the Departments of Commerce and State and the Federal Energy Office (FEO), which was then responsible for administering the price controls on crude oil.

The Commerce Department finally concluded that it had no authority to deny the export license, whether or not the $14.00 per barrel price was a violation of DOE's price regulations (that being a matter within the jurisdiction of the DOE) and, accordingly, the fourth export license also issued.

Prompted by publicity concerning these transactions, the Department of Energy set out to make various inquiries and investigations and issued certain administrative subpoenas. The Chamberlain Group initiated litigation seeking to enjoin any such investigations. Thereafter, the United States counterclaimed, demanding restitution of the alleged overcharges, represented by the difference between the price charged for the oil and the maximum lawful selling price. The Chamberlain Group argued that certain allocation regulations of "export sales" operated to fit their sales within the pricing control exclusion for "exports" under the terms of 10 C.F.R. § 211.1(b)(1). Specifically, the Chamberlain Group relied on 6 C.F.R. § 150.54(d)(1) ("The prices charged for export sales including the sale of products to a domestic purchaser who certifies that the product is for export are exempt."), and on 10 C.F.R. § 212.53(a), which contains similar language. The district court denied the offered interpretation of the regulations.

History of this Litigation

In its September 15, 1980 Order granting, in part, summary judgment to the government, the district court held that:

(1) the four transactions violated the applicable price control statutes and regulations, 499 F. Supp. at 883-4;

(2) judgment should be entered in favor of the United States and against Citronelle-Mobile Gathering, Inc., Citmoco Services, Inc., and Bart B. Chamberlain, Jr., for restitution of all excess charges in the four transactions, such restitution to be made to the United States Treasury, 499 F. Supp. at 886; the Court ruled that Bart B. Chamberlain was individually liable as a central figure in the illegal transactions, but only to the extent that he personally received proceeds from the sales, 499 F. Supp. at 881; and

(3) being "unable to determine from the evidence the amount of restitution to be made, [t]he parties will accordingly be permitted the opportunity to enter a stipulation, failing which, to file appropriate motions." 499 F. Supp. at 888.

Thereafter, the court, pursuant to 28 U.S.C. § 1292(b), granted plaintiffs permission to seek an appeal from the above Order of September 15, 1980 (and another Order not relevant here). In certifying an appeal, in an Order dated March 23, 1981, the district court stated:

> *The case is postured as having been resolved on the merits with only the amount of damages to be calculated* (emphasis added), a task which may prove as arduous as the case itself. This will require the court to determine the prices and destinations of thousands of barrels of oil.
>
> The plaintiffs, in their motion to reconsider . . . have claimed substantial amounts in credits and setoffs for state and federal income taxes paid on the proceeds of these transactions.
>
> * * *
>
> These considerations and calculations, if granted in whole or in part, will be difficult. The dollar amounts involved are substantial. In this regard alone, cer-

tification will materially advance the ultimate termination of this case. Order at 1, 2.

On appeal, the Chamberlain Group argued that the transactions were export sales, and that the grant of restitution to the United States Treasury was erroneous. This Court, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982) (Pointer, J., concurring in part and dissenting in part), affirmed the district court's holding that the sales of American crude oil by an American firm to the wholly owned subsidiary of another American firm were not "export sales" within the meaning of the EPAA and its regulations, and were, therefore, not exempt from price controls. Such sales were described as involving "a mere hint of foreign participation, were designed so as to take advantage of the established regulations and were completely repugnant to Congress' intent." 669 F.2d at 720-21.

This Court further held that the government was not required to make any showing that damages had been incurred as a result of the violations, 669 F.2d at 722, but that "the government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." 669 F.2d at 723 (original emphasis). Thereupon, this Court remanded the case to the district court to determine the amount of restitution and to fashion a plan for the appropriate distribution of those funds.

On remand, the district court reduced the restitutionary awards by the amount of state and federal taxes paid thereon and, further, held that Chamberlain's liability should be limited to the amount of the proceeds which he actually received from the overcharges. Both sides brought this appeal. We confront the following issues:

I. Whether it is now settled as the "law of the case" that the sales of crude oil by plaintiffs to a Bahamian refinery were not exempt from price controls and regulations;

II. Whether the district court properly determined the extent of Chamberlain's personal responsibility for the overcharges;

III. Whether the district court erred by subtracting from the restitutionary recovery the amount of taxes paid thereon;

IV. Whether the district court assessed prejudgment interest at the proper rate;

V. Whether the district court erred in refusing to allow the Department of Energy to use its Special Refund Procedures (10 C.F.R. part 205, subpart V) to distribute the moneys repaid?

I

The four shipments of crude oil from the Chamberlain Group to PETCO were not exempt from price controls

In contesting the earlier finding of liability, the Chamberlain Group poses the wrong question. The issue is not, as they seek to phrase it, whether these sales moved in export, but, rather, whether they were exempt from domestic price controls. The fact that the shipments have gone overseas en route to their ultimate destinations does not preclude further inquiry into whether they were export sales in the context of domestic price controls. As we stated in our earlier opinion:

> This transaction, admittedly clever, is not original. In 1883, the Attorney General issued an opinion evolving from circumstances in which whiskey was to be shipped from the United States to Bermuda with the intent that it be returned to the United States after it had been aged. That opinion, holding there was no exportation, was later quoted with approval by the Supreme Court. *See Swan & Finch v. United States*, 190 U.S. 143, 145, 23 S.Ct. 702, 703, 47 L.Ed. 984 (1903), *quoting* 17 Op.A.G. 579, 583 (1883). The Court stated:

> [T]he legal notion . . . of exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country.

Id. at 145, 23 S.Ct. at 703. *See also United States v. 200 Watches*, 66 F. Supp. 228, 230 (S.D.N.Y. 1946). In the case at bar, appellant's intention was that the refined products attributable to the Chamberlain firm's crude oil be returned to the United States. There was never any intention that the crude oil be joined with the mass of things in the Bahamas.

669 F.2d at 719.

The Chamberlain Group, as the lead issue in their brief and as a principal contention on this appeal, seek to reargue the issue of the applicability of price controls and regulations to the four shipments of crude oil. Apparently, they refuse to accept the results of their first appeal.

In securing export permits from the Department of Commerce, the Chamberlain Group contended that the entire process should be viewed as a single transaction. They relied on a round-trip-transaction theory and, in support thereof, represented to the Department that the crude oil was not lost to the domestic market, certifying that "the total quantity or quality of petroleum available to the United States would not be diminished." In an effort to avoid the adverse result of their first appeal, the Chamberlain Group now argues that "new evidence" proves that this crude oil was shipped to the "unclean hands" of PETCO in the Bahamas, where the excessive costs were paid and, arguably, were not passed on to the consumers in the United States. A review of prior proceedings will affirm that the so-called "new evidence" is not new, and further, has already been effectively answered by this Court.

On an interlocutory appeal limited to the district court's judgment ordering restitution of all excess charges, this Court affirmed. But we also noted that "payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved." 669 F.2d at 722. Finding the prevention of unjust enrichment to be an important objective of the restitution remedy, this Court then modified the district court's Order, directing the government to provide a plan, to be approved by the district court, for the appropriate distribution of the restitutionary award. In affirming the district court's finding that the Chamberlain Group had violated domestic price controls, we wrote: *"No proof is required that the plaintiff (sic) was damaged, much less the amount of any damage."* 669 F.2d at 722 (emphasis supplied).

Upon remand, Judge Alaimo, by Order dated September 30, 1985, stated:

> Most of the factual issues in the case were previously disposed of on cross-motions for summary judgment . . . . *The findings of fact contained herein are made only for the limited purpose of ruling on the amount of restitution to be awarded and are not intended to displace the earlier findings of this Court, which are now the law of the case and are not subject to being relitigated at this late date.* (emphasis supplied).

Order at 4 n. 1.

We find no reason to further belabor an issue that has been so thoroughly briefed, argued and considered in this case. We reaffirm, as the law of the case, our previous holding that the four shipments of crude oil from the Chamberlain Group to PETCO were not exempt from domestic price controls under the provisions of the EPAA and subsequent regulations, and that the Chamberlain Group must make restitution.

II

Chamberlain is personally liable for the entire amount of restitution ordered

The Chamberlain Group and Amicus Chamber of Commerce insist that basic principles of corporate formation preclude this Court from holding Bart Chamberlain personally responsible for the violations committed in the name of the corporate entity. These basic principles teach that corporate shareholders, officers, and directors enjoy limited liability for corporate wrongdoing.

At the outset, we note that the law recognizes occasional exceptions to the general rules. For instance, a shareholder's refusal to respect corporate formality may invite a court to "pierce the corporate veil" in order to reach the individual wrongdoer. Here, however, the government advances a different theory of personal liability. The government has sought a holding of personal liability against Chamberlain on the ground that Chamberlain is a "central figure" in the misconduct of the corporation insofar as his misconduct has brought about the corporate violations of crude oil pricing laws. Although the traditional rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity, here, the government urges us to focus on Chamberlain the actor, rather than Chamberlain the owner. His liability is in no way dependent on a finding that his companies are inadequately capitalized, that his companies are a mere alter ego of Chamberlain, that the corporate form is being used to perpetrate a fraud, or that his companies have failed to comply with corporate formalities. Liability is premised only on a finding that Chamberlain committed the wrongful acts.

The Chamberlain Group concedes the existence of this theory of personal liability, but argues that liability is limited to the extent Chamberlain has committed a com-

mon law tort or, in other words, that Chamberlain cannot be held liable for conduct which cannot be packaged as a tort under the common law. The Chamberlain Group finds particular comfort in this version of the theory, given the trial court's suggestion that Chamberlain and his companies have merely committed an "honest mistake" in running afoul of the export pricing restrictions. The government characterizes such an honest mistake as a gambling, miscalculated effort to stretch the limits of the law—as nothing other than a statutory violation which can give rise to personal liability for Chamberlain in the amount of the overcharges.

The Chamberlain Group argues that this Court's decision in *Johnson Oil Company, Inc. v. U.S. Dep't of Energy*, 690 F.2d 191 (Temp. Emer. Ct. App. 1982), disposes of the liability issue presently before the Court. We disagree. *Johnson Oil* also involved pricing overcharges, but its holding relating to personal liability was very limited: The corporate officers had not knowingly, willfully, or maliciously authorized violations of the law and, therefore, could not be held individually responsible under 15 U.S.C. § 754(a)(4). *Johnson Oil* did not present the Court with liability questions premised on theories of individual tortious conduct or piercing the corporate veil. 690 F.2d at 203. In this respect *Johnson Oil* was entirely unlike this Court's decision in *United States v. Arizona Fuels Corporation*, 638 F.2d 239 (Temp. Emer. Ct. App. 1980), *cert. denied*, 451 U.S. 985 (1981), wherein the sole stockholder of Arizona Fuels Corporation was held jointly liable on the basis of a finding that large amounts of corporate funds were diverted for personal use.

This Court's recent decision in *United States v. Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), *cert. denied*, 107 S.Ct. 873 (1987), is more relevant. *Sutton* involved miscertification, or "tier laundering," of crude oils—a plan carried out by Sutton under the protective wing of his corporation. Sutton argued, unsuccessfully,

that 15 U.S.C. § 754(a)(4) provides the exclusive remedy for knowing and willful violations of the Act by corporate officers (i.e., no personal liability upon the basis of alter ego or tortious conduct). *Sutton* explicitly rejects such a narrow view of personal liability. 795 F.2d at 1059. Rather, this Court in *Sutton* affirmed the trial court's imposition of personal liability on the alternative basis of Sutton's noncompliance with corporate formalities ("piercing" theory) and, also, Sutton's own decisive role in violating the pricing laws ("central figure" theory). As this Court in *Sutton* was careful to stress, personal liability premised upon the latter theory "depends upon the individual's acts." 795 F.2d at 1060.

Inasmuch as Chamberlain is the dominant figure of the Citronelle companies, the government urges this Court to recognize his personal responsibility on the strength of a "central figure" theory of liability. The Chamberlain Group, on the other hand, insists that *Sutton* first requires a finding that Chamberlain has committed a recognizable "tort" before personal liability ensues. We acknowledge the tortious conduct language in *Sutton*. ("A shareholder may be liable if he is the 'central figure' in a corporation's tortious conduct." 795 F.2d at 1060). Essentially, however, the Chamberlain Group argues that a corporate officer cannot be held liable for *unintentional* "tortious conduct." Cross-Appellant Brief at 37. "Tortious conduct," according to the Chamberlain Group, is epitomized by the miscertification-fraud scheme of the *Sutton* case.

The Chamberlain Group finds particular comfort in this view of a central figure theory of liability, based upon the trial court's characterization of their conduct as that of "good faith." 499 F. Supp. at 888. They argue that such a finding precludes the existence of culpable conduct and therefore forecloses a judgment of personal liability. But we cannot accept such an expansive view of the trial court's references to good faith.

First, "good faith" has no meaning without a context. It is an intangible and abstract quality; at one time it might indicate an honest belief, the next time it could signify only the absence of malice. Black's Law Dictionary 623 (5th ed. 1979). Second, the trial court used the term good faith in a context that tells us nothing about the scope of liability the government now urges upon the Court. In considering whether to assess an added penalty on the Chamberlain Group, which would require a finding that they "willfully" violated the FEA pricing regulations, the district court found instead that they "made a good faith effort to comply with the regulations." *Id.* Therefore the added penalty was not imposed. But the court's statement tells us only that the Chamberlain Group did not act "willfully" to violate the regulations. The statement gives no instruction on whether the Chamberlain Group intended their effort to comply with the spirit of the price control laws and regulations, or whether there existed any sound rationale for believing that their ephemeral success in obtaining permits could excuse their obligation to charge the crude oil price prescribed by law. In short, the court's good faith reference did not close the book on equitable considerations, nor did it preclude our examination of Chamberlain's personal role in violating the pricing laws.*

Judges Pittman and Alaimo and the first panel of this Court rested their decision on cases which recognize that personal liability of corporate personnel need not be dependent upon establishing the elements of common law torts.

In *LCL Theatres v. Columbia Pictures Industries*, 619 F.2d 455 (5th Cir. 1980), the "tortious act" was the nonperformance of a contractual obligation. The court found personal liability because the corporation's president and principal shareholder authorized, participated in and ap-

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* The first TECA panel's reference to good faith, 669 F.2d at 722, was made in a similar vein.

proved the breach of duty. Similarly, *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978), held the president of a corporation personally liable for authorizing the acts of unfair competition which formed the basis for the corporation's liability. *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 517 F.2d 1141 (4th Cir. 1975), held the directors of a community swimming pool association personally liable under the federal civil rights statutes for causing discrimination against black applicants for membership. The court's holding explored the parallel between conduct which violates general principles of tort law, and conduct which infringes rights secured by statutes. The court also explicitly rejected as a defense due diligence based on the advice of counsel. A rather different analysis was used in *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133 (2d Cir.), *cert. denied, Miller v. United States*, 106 S.Ct. 605 (1985). The Second Circuit affirmed the finding of personal liability for officers of a closely held corporation because the officers' activities—failing to prevent the illegal dumping of dangerous wastes—fell within the "proscriptive ambit" of the applicable statute. Their liability "was not premised solely on their corporate offices or ownership, but was bottomed on their personal involvement in the firm's activities." 763 F.2d at 135.

We believe the sum of the holdings in these cases is that personal responsibility for corporate liability may attach when the individual's wrongful conduct causes the violation of a statute and accompanying regulations such as the crude oil pricing laws. But because restitution is an equitable remedy, we would be careful to condition a finding of personal liability on the particular circumstances and equities of each case.

Chamberlain played the central role in the Chamberlain Group's breach of public duty as defined by the statute and pricing regulations. Chamberlain authorized and conducted the very negotiations leading to the viola-

tions for which the corporations are now liable. Chamberlain knew the agreement was to charge a price almost three times greater than the domestic price ceilings would permit. He knew domestic customers would be the ultimate consumers of the refined oil, but nevertheless used a "loophole" which he believed would excuse him from charging the lawful price. His companies stood to gain some six million dollars in additional revenue. In rejecting the Chamberlain Group's arguments, the district court, Judge Pittman, remarked that "these transactions had precisely the effect which Congress sought to avoid in enacting the EPAA. . . The court must determine whether the transactions were exempted from pricing regulations by the export license. They were not." 499 F. Supp. at 883. We conclude that Chamberlain's conduct constitutes actual participation in the wrongful acts.

Chamberlain argues that he relied on the advice of counsel. Even if we were to recognize, as a matter of law, the existence of a due diligence defense, we do not believe Chamberlain has established such a case. We balk at embracing this argument for two reasons. First, it suggests that counsel's view of the law must be the law of the Court, that the Court is not permitted to scrutinize the adequacy of counsel's inquiry. Second, we are not persuaded that Chamberlain's deference to counsel excuses what amounts to acting in disregard of the crude oil pricing restrictions. The due diligence defense would apply if, after diligent effort, it was impossible for Chamberlain to know that his companies were violating the law. At the time, Chamberlain directed successful businesses and was experienced in the world of selling oil. All oil corporations knew about the laws Congress passed to cope with the pain of the oil embargo, and Chamberlain was certainly aware of pricing restrictions and the existence of the Department of Energy and its predecessor, the Federal Energy Administration. Chamberlain's

reliance on the "authority" of export permits issued by the Department of Commerce as a justification for his scheme can be characterized as nothing other than acting in disregard of the pricing controls that he knew existed. Whether Chamberlain hoped, with advice, that the transfers of oil would elude the reaches of the domestic price controls, or whether he simply ignored the better judgment that would have advised greater caution, this Court concludes that Chamberlain's disregard of the price control laws caused a breach of the duty delineated in the energy statutes and pricing regulations. Under a central figure theory of liability, Chamberlain may be held personally liable for restitution.

The district court, Judge Pittman, held Chamberlain personally liable only to the extent he received proceeds from the illegal sales. Liability was thus limited "[b]ecause restitution is predicated upon a finding of unjust enrichment." 499 F. Supp. at 881. On remand after the first appeal, Judge Alaimo adopted the earlier view of the extent of Chamberlain's liability and fixed the amount of restitution accordingly:

> The parties have stipulated that Chamberlain earned $147,828.59 in excess of the applicable ceiling prices for domestic oil sales. Less the $8,869.71 he paid in state severance taxes, Chamberlain personally netted $138,958.88 from the PETCO sales, and counterclaimant is thus entitled to restitution in that amount.

Order at 12.

The district court declined to "reconsider" whether Chamberlain could be held personally liable for the entire amount awarded against the Chamberlian Group because, in its view, the parties already had the opportunity to appeal personal liability issues to this Court and, therefore, this Court's previous ruling should "remain undisturbed as law of the case." Order at 13.

We reject the district court's finding that the parameters of Chamberlain's personal liability have been established previously as law of the case. The first panel of this Court took the case on interlocutory appeal under 28 U.S.C. § 1292(b). Primarily, the appeal concerned whether the Chamberlain companies had violated the pricing control regulations. As one judge of this Court remarked with respect to restitution issues:

> There [was] no cross-appeal by the government under § 1292(b), and there [was] no final judgment in the district court from which appeals might be taken on all issues which bear upon the proper relief, if any, to be granted on proof of statutory violations.

669 F.2d at 727 (Pointer, J., dissenting).

Now, however, the district court has entered a final judgment, this Court has combed through the more comprehensive briefs of the parties, and we can decisively express in what manner we disagree with the decision below.

"Ordinarily, the measure of restitution is the amount of enrichment received." Restatement of Restitution § 1 comment a (1937). However, restitution also can serve "to restore the status quo." *Sauder v. Department of Energy*, 648 F.2d 1341, 1348 (Temp. Emer. Ct. App. 1981). "[A] person who has been unjustly deprived of his property or its value . . . may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby." Restatement of Restitution § 1 comment e (1937).

In *Sutton*, this Court found that "[a] person who is the 'animating force' for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities." 795 F.2d at 1063. Consequently, this Court held Sutton personally responsible for the entire amou[n]t of restitution awarded for corporate violations.

Our holding in *Sauder* is closer factually to this case and equal to *Sutton* as precedent for holding Chamberlain fully responsible for the amounts awarded as restitution. Sauder was the part owner and operator of three oil leases. He owned a 34% interest in one lease, and a 41% interest in another. He shared ownership of the leases with at least five other persons, and these part owners operated the leases as if they were a single unit. However, they never entered a formal unitization agreement which would combine the separate interests into one tract so that oil could be extracted without regard to surface property lines. This failure to unitize the field proved to be fatal to Sauder's attempt to come within the exemption from price controls for "stripper" well leases. Treated as one lease or "property," Sauder's holdings would have satisfied the language of the exemption for "any lease whose average daily production of crude oil for the preceding calendar year does not exceed 10 barrels per well." 648 F.2d at 1342. Sauder claimed the stripper well exemption because he viewed the leases as one unit. The Department of Energy disagreed, finding that the leases must be considered as three properties and, therefore, outside the exemption.

This Court affirmed the decision ordering Sauder to refund the *full amount* of the overcharges on the nonexempt oil. We rejected the argument that Sauder should be responsible only for the amount of his pro rata interest in the leases. Sauder was the "animating force" who certified that the output of the leases was stripper well oil subject to the exemption. "It can fairly be said that it was he who caused the overcharges." 648 F.2d at 1347.

Similarly, Chamberlain has been the "animating force" behind the sale of Citronelle Field oil to PETCO. Like Sauder, he sought to take advantage of what he considered a "loophole" in a maze of regulations, despite a public policy disfavoring exemptions from domestic oil

price controls. Both individuals gambled and lost. Like Sauder, "[i]t can fairly be said that it was [Chamberlain] who caused the overcharges."

In *Sauder*, we rejected the argument that the common law concept of restitution does not permit a court to order an infringer to refund benefits never received by that individual. 648 F.2d at 1348. We refused to characterize the decision to hold Sauder fully responsible in restitution as an attempt to award damages to the victimized party. Rather, we imposed liability in such a manner as to restore the precise amount of the overcharges, "to set things right." 648 F.2d at 1348.

We recognize that the finding of liability is premised upon a "central figure" theory here, and upon an "operator" theory in *Sauder*. But the distinction is without a material difference. "Central figure" theory is the specific language of the corporate-director realm, whereas "operator" theory need not be so specifically applied. The theories accomplish the same thing by holding responsible the primary instruments of illegal conduct. Any doubt that *Sauder* could be applied in the corporate context was resolved by the reliance *Sutton* placed on the *Sauder* decision.

Because a corporate officer's unlawful conduct may form the basis for personal liability if the equities of the case demand it, as they do here, we conclude that the principle of *Sauder* applies to require us to rule that Chamberlain is fully responsible for making restitution to the injured parties.

III

The district court erred by subtracting from the restitutionary recovery the amount of taxes the appellees had paid thereon

Following remand, Judge Alaimo, in an Order dated September 30, 1985, found that "[s]imple arithmetic re-

veals that defendant's sales to PETCO gave rise to overcharges totaling $6,769,956.76." Order at 6. Notwithstanding that fact, the district court, in an effort to determine "the amount by which defendants were unjustly enriched as a result of the illegal sales," Order at 5, reduced that figure by various overhead and administrative expenses and, finally, by the state and federal income taxes each company had paid on the overcharges. The court found that Chamberlain had earned $147,828.59 in excess of the lawful ceiling price from his share of the crude oil which had been collected for the sale to PETCO, and had paid $8,869.71 in state severance taxes thereon. Thereupon, the court ordered that judgment be entered against Citronelle-Mobile Gathering, Inc. and Citmoco Service, Inc. jointly and severally in the amount of $3,400,475.76, plus interest, and against Bart B. Chamberlain in the amount of $138,958.88, plus interest. The decision amounted to reducing the restitution by half.

The Chamberlain Group urges this Court to affirm Judge Alaimo's decision to subtract taxes paid from the restitution award. Their position rests largely on resurrected arguments which attempt to deny their own culpability and which emphasize the district court's apparent inability to find injury. According to the Chamberlain Group, restitutionary payments would simply be windfalls to uninjured and undeserving beneficiaries. Because Chamberlain committed only an "honest error," the Chamberlain Group contends that the district court ruled properly in subtracting taxes in order to prevent "double recovery" by the government.

This line of argument is misdirected, not only because it contests the basis for our finding a violation of the price controls, but because it also posits the scenario of the government "positioning *itself*" for a windfall recovery. Any illusion the Chamberlain Group has of the

federal government padding its wallet may have been created by Judge Pittman's initial decision to award restitution in favor of the U.S. Treasury. But we have already corrected that decision and, consequently, fears of government "positioning" should have been eased.

The district court has broad powers to fashion equitable relief. The equitable remedy of restitution should make victims whole, unless some compelling reason counsels otherwise. We believe the subtraction of taxes precludes the award of an amount which would make victims whole and we find no compelling reason to detour from pursuing that objective. When the district court strays from its duty to order proper restitution, it is our role "to do equity" and correct the lower court. *Citronelle-Mobile*, 669 F.2d at 722, 723 (cited in *United States v. Exxon Corporation*, 773 F.2d 1240, 1284 (Temp. Emer. Ct. App. 1985), *cert. denied*, 106 S.Ct. 892 (1986)). We conclude that the district court improperly reduced the restitutionary amount and, therefore, failed "to do equity."

Upon the basis of a finding of "good faith" on the part of Chamberlain, Judge Pittman had refused to impose civil penalties in addition to ordering restitution. But a finding of good faith that would relieve a wrongdoer from civil penalties is not equivalent to a finding that should not be required to make restitution. In *Exxon*, the appellant argued that the "trial Court, as a court of equity, erred in requiring restitution of the full amount of the overcharges with interest." 773 F.2d at 1284. We rejected that argument in *Exxon* as we do here. As Justice Holmes stated in a different factual situation:

> It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he de-

> sired to keep within it will not help him. It means only that he misconceived the law.

Horning v. District of Columbia, 254 U.S. 135, 137 (1920).

Moreover, there was no requirement that the government identify the particular persons overcharged. In *Exxon*, an action for restitution against the operator of a unitized oil field, this Court held "there was no need for the district court to attempt the impossible task of attempting to ascertain the damages sustained by individual customers of petroleum products." 773 F.2d at 1286. And as this Court has already said, "[n]o proof is required that the plaintiff was damaged, much less the amount of any damage." *Citronelle-Mobile*, 669 F.2d at 722.

The allegation of the prospect of a double recovery by the government finds no support in the record, since the presumption that the federal government will be the primary beneficiary of restitution is an unsound one. Repeatedly, the government has sought permission to utilize its Subpart V procedure to locate injured victims. In fact, before any part of the restitution award accrues to the account of the U.S. Treasury, the government first must make efforts to identify overcharge victims and, perhaps, to spread the recovery among certain states. In any event, the reduction for taxes imperils a restitution award that should restore the status quo.

A variation on Chamberlain's central theme is that a decision which does not allow for subtraction of taxes amounts to levying a "double penalty." The Chamberlain Group argues that if it must disgorge the full amount of the overcharges then it should not have been required to pay taxes on the overcharges received. Since the taxes were paid, however, a sum representing taxes paid should be taken off the top of the restitution award. This argument concludes that a dollar-for-dollar reduction from the

judgment is necessary because the corporate income for future years will be insufficient to fully utilize the tax deduction that could be taken as the entire restitution award is paid. We find the conclusion to be entirely speculative. We are satisfied that the Chamberlain Group can pursue its tax grievances with the IRS.

IV

The district court failed to assess prejudgment interest at the proper rate

The district court entered judgment on the reduced restitutionary amount together with prejudgment interest at the rate of 6% per annum as prescribed by Alabama law. On this appeal, the Chamberlain Group has argued that a lower-than-market rate of interest is justified given the relevant equitable considerations. Once again, we are requested to consider such factors as the advice of counsel, "good faith," the lack of injury, the "windfall" that will flow to the government, and the four-year lapse of time before the government decided the oil transactions were illegal. We have already addressed the relative significance of these considerations as they relate to awarding restitution, and have decided, nonetheless, that full restitution is proper.

The duty to make full and adequate restitution must, of necessity, include the benefits the wrongdoer enjoyed by having the use over the years of the money illegally obtained. Although the district court does have some discretion in assessing prejudgment interest, the court neglected to offer a reason for choosing the 6% rate applicable to state court judgments, rather than the market rate. As the district court in *Exxon* stated:

> The court's equitable powers to order restitution permit the court to deprive the wrongdoer of all enrichment obtained at the victim's expense, *Citronelle-Mobile Gathering, Inc. v. Edwards*, *supra*, 669 F.2d at 722, and that enrichment necessarily

> includes the benefits Exxon obtained by having the use over the years of the money illegally obtained. Accordingly, this court shall order that restitution of Exxon's overcharges shall be made with interest from the date of overcharge.

United States v. Exxon Corporation, 561 F. Supp at 816, 858 (D.D.C. 1983).

In light of the district court's obligation to order restitution, and its failure to explain why it chose a 6% rate, we cannot say the court has exercised its discretion to fulfill that obligation.

We acknowledge that, although federal law governs the rate of prejudgment interest applicable to this case, state law may be used as a guide for a court exercising its discretion. However, no explanatory comments accompany the district court's selection of Alabama's 6% rate. We defer to our language in *Exxon*: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." 773 F.2d at 1278. The district court in *Exxon* adopted an interest rate schedule bearing "a reasonable relation to the value to Exxon of the funds it unlawfully retained." 561 F. Supp. at 858. We approved of the decision then, and now we adopt the interest rate schedule offered by the DOE * as having "a reasonable relation to the value to [the Chamberlain Group] of the funds it unlawfully retained." Restitution should disgorge unjust enrichment and restore the status quo.

Because the DOE interest rate schedule more realistically reflects the full value of money retained by the Chamberlain Group over these years, we meet the equitable objectives of restitution by requiring an award of interest at market rates.

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* See Appendix.

V

The Court allows use of the special refund procedure established in 10 C.F.R. part 205, subpart V

The government has requested that the restitution funds be placed in a special escrow account for distribution pursuant to the refund procedure set out in 10 C.F.R. part 205, subpart V. The Chamberlain Group argues that the use of the special procedure will allow the government to place itself in the position of becoming the "beneficiary of the restitutionary fund."

The decisions of the district courts and the first TECA panel placed on the government the duty of identifying the injured parties and the extent of their injuries. Each court acknowledged the difficulty of that role, but believed that such a tracing was necessary before the method for distribution could be settled.

The government has responded that the appropriate procedure for identifying those proper recipients of the restitutionary funds is the subpart V proceedings it sought to utilize. Subpart V of the 10 C.F.R. part 205 (10 C.F.R. §§ 205.280-205.288 (1986)) presents the procedural mechanisms established by the Department of Energy for identification of the injured parties and disbursement of restitution funds. Under these specifications, the Office of Hearings and Appeals (OHA) or its appointed administrator solicits, by publication in the Federal Register, applications from any person entitled to a refund. It then processes the applications and approves the refunds. Payments are made to successful applicants from the escrow fund established for this purpose (after satisfaction of costs and charges approved by the OHA).

The district court's Order of December 30, 1985 expressed concerns about the adequacy of the Subpart V procedures. It specifically referred to criticism made in law review notes. Order at 13. However, we are now

satisfied that such concerns have been adequately answered by the "significant progress" the OHA has made in implementing the procedures. *See In re Dept. of Energy Stripper Well Exemption Lit.*, 578 F. Supp. 586, 596 (D. Kan. 1983).

The initial step in distribution of restitutionary funds is identification of the injured parties. We believe the Department of Energy should be allowed to use its established procedures to make those findings and to offer solutions to possibly complex remedial problems. This was the comprehensive approach taken by Judge Theis of the District Court of Kansas, to whom TECA remanded the "Stripper Well" case for the task of "appropriate dispensation of the escrowed funds." 578 F. Supp. at 589.

Nevertheless, it is the duty of the courts to award restitution equitably. It is the responsibility of the court, not of an administrative body like the Department of Energy, to exercise its equitable powers in the final determination of appropriate restitution to the proper parties. Therefore, jurisdiction over the restitution fund will remain in the district court.

Conclusion

We conclude that Gathering, Services, and Chamberlain, personally, are jointly and severally liable for the full amount of overcharges, $6,769,956.76, plus prejudgment interest according to the market rates set forth in the Appendix.

This Court now remands the case to the district court to maintain jurisdiction over the distribution of the restitutionary award. The district court shall have the tasks of establishing an escrow fund, of overseeing the government's implementation of its Subpart V procedures, of making the final determination of the use of the restitution funds upon receipt of the government's factual determination and recommendations, and of final dispensation of the escrowed amounts.

APPENDIX

The DOE schedule for the computation of interest on overcharges is reprinted, in part, in 46 Fed. Reg. 21,412-21,414 (1981), along with a description of how interest should be computed at the average prime rate value published in the Federal Reserve Bulletin for each calendar quarter after October 1, 1979.

Period	Interest Rate (percent)
Prior to Oct. 10, 1974	7
Oct. 10, 1974 to Sept. 30, 1979	9
Oct. 1, 1979 to Dec. 31, 1979	11.70
Jan. 1, 1980 to March 31, 1980	14.25
April 1, 1980 to June 30, 1980	15.39
July 1, 1980 to Sept. 30, 1980	18.22
Oct. 1, 1980 to Dec. 31, 1980	11.74
Jan. 1, 1981 to March 31, 1981	14.03
April 1, 1981 to June 30, 1981	19.98
July 1, 1981 to Sept. 30, 1981	18.27
Oct. 1, 1981 to Dec. 31, 1981	20.31
Jan. 1, 1982 to March 31, 1982	18.46
April 1, 1982 to June 30, 1982	16.02
July 1, 1982 to Sept. 30, 1982	16.50
Oct. 1, 1982 to Dec. 31, 1982	15.72
Jan. 1, 1983 to March 31, 1983	12.62
April 1, 1983 to June 30, 1983	11.21
July 1, 1983 to Sept. 30, 1983	10.50
Oct. 1, 1983 to Dec. 31, 1983	10.63
Jan. 1, 1984 to March 31, 1984	11.00
April 1, 1984 to June 30, 1984	11.00
July 1, 1984 to Sept. 30, 1984	11.84
Oct. 1, 1984 to Dec. 31, 1984	12.87
Jan. 1, 1985 to March 31, 1985	12.44
April 1, 1985 to June 30, 1985	10.72
July 1, 1985 to Sept. 30, 1985	10.44
Oct. 1, 1985 to Dec. 31, 1985	9.59
Jan. 1, 1986 to March 31, 1986	9.50

PECK, Judge, concurring.

I write separately only because ever since my earliest contact with this case I have had a different feeling about Chamberlain's activities than those expressed in the majority opinion. Chamberlain first sought and obtained legal advice from a source which we would be hard pressed to declare incompetent, then followed a procedure "government officials had consistently, if begrudgingly" recognized. *Citronelle-Mobile Gathering, Inc., v. Edwards*, 669 F.2d 717, 724 (Temp. Emer. Ct. App. 1982) (Pointer, J., concurring and dissenting). The fact that the advice was not egregiously erroneous is attested to by the four years which it took government officials to adopt a contrary position. I am similarly concerned with the majority's reliance on *United States v. Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), *cert. denied*, —— U.S. —— (Jan. 12, 1987), which involved criminal activity and overwhelming evidence of intentional wrongdoing, and which seems to me to be inappropriate. As a result, I am uncomfortable with an opinion which impugns Chamberlain's ethics and procedures, but otherwise concur.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 77-0101

CITRONELLE-MOBILE GATHERING, INC., et al.,
PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS

v.

JOHN HERRINGTON, et al., DEFENDANTS

and

UNITED STATES, COUNTERCLAIMANT

ORDER

This case comes before the Court on remand from the Temporary Emergency Court of Appeals ("TECA"). The sole issues to be resolved are: (1) the amount of restitution to be awarded against the counterclaim-defendants for their violations of certain laws regulating the price of petroleum products, and (2) the method by which those restitution funds will be distributed to victims of the overcharges.

PROCEDURAL BACKGROUND

This action was initially filed by Citronelle-Mobile Gathering, Inc., and others, seeking declaratory and injunctive relief against officials of the Federal Energy Administration, now the Department of Energy ("DOE"), and the Secretary of the Department of Commerce.

The Government counterclaimed, seeking to compel Bart B. Chamberlain ("Chamberlain"), Citronelle-Mobile Gathering, Inc. ("Gathering"), and Citmoco Services, Inc. ("Services"), to make restitution of alleged overcharges received as a result of four transfers of crude oil to the Grand Bahamas Petroleum Company, Ltd. ("PETCO"), a Bahamian corporation and a wholly-owned subsidiary of the New England Petroleum Corporation ("NEPCO"). The sales to PETCO took place between December 20, 1973, and May 26, 1974. The first three shipments were sold for $14.00 per barrel and the final shipment for $13.00 per barrel, prices admittedly higher than defendants could have charged had the sales been made to United States purchasers.

On behalf of NEPCO customers, the Government seeks to recover the difference between the payments defendants actually received and the maximum lawful selling prices. The Honorable Thomas Virgil Pittman, who was Chief Judge of this Court at the time of his ruling, concluded that defendants had violated the provisions of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, and the regulations promulgated thereunder setting ceiling prices for sales of domestic crude oil. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871, 883-84 (S.D. Ala. 1980).

Accordingly, pursuant to ESA § 209, 12 U.S.C. § 1904 note, the Court ordered restitution in favor of the United States Treasury. *Id.* at 886. The Court ruled that Chamberlain was individually liable as a central figure in the illegal transactions only to the extent he personally received proceeds from the sales. *Id.* at 881. The Court further held that civil penalties were not warranted here because defendants made a good faith effort to comply with extremely confusing regulations. *Id.* at 888.

On appeal, TECA affirmed this Court's finding that defendants had violated the petroleum price control laws, but held that payment to the United States Treasury did not satisfy the statutory obligation to make restitution. *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 722 (Em.App. 1982). The case was remanded for entry of an order setting out appropriate procedures for distribution of the restitution funds. *Id.* at 723. Before this Court can determine an appropriate method of disbursement, however, it must first create a fund out of which restitution can be made. To that task the Court will now turn its attention.

I. *FINDINGS OF FACT*

This action came on for trial before the Court on October 1, 1985, to resolve certain issues raised by the counterclaims.[1] *After considering the evidence at trial and the arguments of counsel, the Court makes the following findings of fact.*

This case involves four sales of Citronelle crude oil by defendants Gathering and Services to PETCO, a Bahamian corporation. In early 1974, the crude oil was shipped to the Bahamas pursuant to validly issued export licenses, where it was then refined. The refined products in turn were sold to NEPCO, a United States affiliate of PETCO, for resale to United States customers, principally utilities on the East Coast. The sales to

[1] Most of the factual issues in the case were previously disposed of on cross-motions for summary judgment. *See Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871 (S.D. Ala. 1980), *aff'd as modified sub nom. Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Em.App. 1982), *cert. denied*, 459 U.S. 877 (1982). The findings of fact contained herein are made only for the limited purpose of ruling on the amount of restitution to be awarded and are not intended to displace the earlier findings of this Court, which are now the law of the case and are not subject to being relitigated at this late date.

PETCO were conditioned upon, and made in reliance on, the opinion of reputable counsel that the transactions were not subject to price controls.

The Government filed its counterclaim late in 1978, alleging the sales to PETCO were not exempt from price controls. As an indispensable element of its cause of action under § 209 of the ESA, the Government had to allege injury to a class of persons protected by the EPAA. Counterclaimant identified the customers of NEPCO as the injured class on whose behalf it sought restitution. This hearing was held in part to ascertain what entities or individuals were victimized by the overcharges and in what dollar amounts. The Court is also charged with determining the amount by which defendants were unjustly enriched as a result of the illegal sales.

Pursuant to export licenses issued by the Department of Commerce, defendants shipped four cargoes of crude oil from Mobile, Alabama, to Freeport, Bahamas, in quantities and at prices as follows:

Date	*Barrels*	*Price Per Barrel*	*Selling Price*
January 6, 1974	279,213.47	$14.00	$ 3,908,988.58
January 21, 1974	254,640.80	$14.00	3,564,972.04
February 27, 1974	231,448.72	$14.00	3,240,198.08
May 26, 1974	199,812.86	$13.00	2,597,567.18
	965,109.91		$13,311,725.88
		Adjustment	— (911.88)
		TOTAL SALES	$13,310,814.00

The crude oil sold to PETCO was obtained at a total acquisition cost of $6,338,063. Additional transaction costs included $51,591 in terminal charges, $1,277 in trucking charges, $1,617 in cargo inspection charges, $50,439 in legal expenses and $1,400 in administrative expenses. The net revenue from the PETCO sales, there-

fore, totaled $6,866,427. This net revenue figure was divided 50/50 between counterclaim-defendants Gathering and Services because the two companies entered into the PETCO sales as joint venturers, giving each entity net revenues of $3,433,213 for the transactions. Each company then paid state and federal income taxes, leaving Gathering with net after-tax revenues of $1,830,485 and Services with net after-tax revenues of $1,666,460. The total amount that the two companies profited from the PETCO sales was thus $3,496,945.

Gathering and Services paid acquisition costs ranging from $4.70 per barrel to $11.31 per barrel. Under 10 C.F.R. § 212.93, defendants were entitled to charge a $.25 markup over cost, yielding maximum lawful selling prices ranging from $4.95 to $11.56 per barrel. One can calculate the resulting amount of overcharges by multiplying the total number of barrels in each of the four shipments by defendants' actual selling prices, then subtracting from that figure the sum which results from multiplying the total number of barrels in each shipment by the admitted maximum lawful selling prices. Simple arithmetic reveals that defendants' sales to PETCO gave rise to overcharges totaling $6,769,956.76.

Defendant Chamberlain earned $147,828.59—in excess of the selling prices applicable to nonexempt domestic oil sales—from his share of the Citronelle crude Gathering and Services acquired for resale to PETCO. After deducting the $8,869.71 he paid in state severance taxes, Chamberlain personally made a net profit of $138,958.88 on the PETCO transactions. Chamberlain reported the excess earnings on his state and federal income tax returns for the year ending December 31, 1974.

Although the Government named some 13 utilities along the Atlantic seaboard who were customers of NEPCO and who might have been victims of overcharges caused by the PETCO sales, counter-claimant, to date,

has failed to produce a scintilla of evidence to support its claim that the overcharges were indeed passed on to American companies or ultimate consumers. On the contrary, Edward S. Carey, former president of NEPCO, testified by deposition that NEPCO's prices to customers were fixed with reference to Platt's Oilgram and other leading industry indicators, not necessarily by the price NEPCO paid for oil. The selling prices were thus locked in by contract irrespective of the acquisition costs to NEPCO. Even though NEPCO may have paid more than it should have, it is barred from restitution by the "clean hands" doctrine.

II. *CONCLUSIONS OF LAW*

A. *Amount of Restitution to be Awarded*

Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, authorizes the Attorney General of the United States to bring enforcement actions against any individual or organization who violates wage and price control laws and regulations. In addition to allowing injunctions against such illegal practices, § 209 provides that "the court may also order restitution of moneys received in violation of any such order or regulation." The statute does not define "restitution," but legislative history accompanying the 1971 ESA amendments makes it clear that Congress was simply reaffirming "an inherent equitable power in the court to set things right." *See* P.L. 92-210, S. Rep. No. 92-507, 92nd Cong., 1st Sess. (1971), *reprinted in* 1971 U.S. Code Cong. & Admin. News 2283, 2291.

Restitution is an equitable remedy resting within the sound discretion of the trial court judge. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1945); *Lawrence v. St. Louis-San Francisco Ry. Co.*, 278 U.S. 228, 49 S.Ct. 106, 73 L.Ed. 282 (1929); *Russell v. Farley*, 105 U.S. 433, 26 L.Ed. 1060

(1881). As Justice Cardozo noted in *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1934): "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it. . . . [T]he simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received." *Id.* at 310, 55 S.Ct. at 713, 79 L.Ed. at 1458.

A cause of action for restitution is a distant relation of the ancient action for money had and received, a remedy which is equitable in origin and function. *Atlantic Coast Line R.R. v. Florida, supra* at 309, 55 S.Ct. at 713, 79 L.Ed. at 1457. To recover, the claimant must show that the money was received under such circumstances that it would give offense to equity and good conscience for the possessor to retain it. *Schank v. Schuchman*, 212 N.Y. 352, 106 N.E. 127 (1914); *Western Assurance Co. v. Towle*, 65 Wisc. 247, 26 N.W. 104 (1885).

Unjust enrichment is a prerequisite for restitution, for without unjust enrichment there can ordinarily be no restitution. *See generally* Restatement, *Restitution* §§ 1, 3 (1937); 66 Am.Jur.2d, Restitution & Implied Contracts, §§ 3, 4, 11 (1973). Unjust enrichment is commonly defined as the unjust retention of money or benefits which in justice and equity belong to another. Restatement, *Restitution* § 1, Comments a-c; *Rankin v. Emigh*, 218 U.S. 27, 30 S.Ct. 672, 54 L.Ed. 915 (1910). Retention of a benefit is unjust where the benefit is wrongfully obtained or passively received by one who had no right to it. Restatement, *Restitution* § 1, Comments a-c.

The courts have also recognized a basis for restitution when one obtains benefits by violating a legal duty, even though that violation may not result in an injury to any

identifiable individual. An action under ESA § 209 is an example of just such a situation. As TECA explained: "Actions by the United States under ESA § 209 are taken to enforce public, not private rights. Thus, compensation is 'a by-product of the agency's effort to reestablish compliance with its regulatory scheme.'" *Citronelle-Mobile Gathering, Inc. v. Edwards, supra* at 722 (Em.App. 1982), *citing Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (Em.App. 1980). Where a legally protected interest has been invaded, therefore, "no proof is required that the plaintiff was damaged, much less the amount of any damage." *Citronelle-Mobile Gathering, Inc. v. Edwards, supra* at 722, *citing* Restatement, *Restitution* § 1, Comment e.

Whether an action for restitution is founded upon an injury to a particular party or upon invasion of a legally protected public right, however, the measure of recovery is still the same. The principal thrust of restitutionary remedies is always to determine the amount by which a defendant has been unjustly enriched and then to make the wrongdoer disgorge its ill-gotten gains. D. Dobbs, *Remedies* § 4.1, at 224 (1973); G. Palmer, *Law of Restitution*, § 2.6, at 82 (1978); *see also Citronelle-Mobile Gathering, Inc. v. Edwards, supra* at 722-23, *aff'g Citronelle-Mobile Gathering, Inc. v. O'Leary, supra* at 885. In the instant case, this Court earlier held that "the amount of restitution is equal to the amount of illegally obtained *profits*." *Citronelle-Mobile Gathering, Inc. v. O'Leary, supra* at 887 (emphasis added).

To allow recovery of profits only, as opposed to total overcharges, seems fair considering the unusual facts of this case. First, the violations in question were not willful. Having sought advice of counsel before proceeding with the PETCO sales, defendants made a good faith effort to comply with the pricing regulations and fully explained the proposed transactions to Government offi-

cials when applying for export licenses. Indeed, it appears that any fault lies as much with DOE officials who were inexperienced in administering the new regulations as it does with the Citronelle companies. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, *supra* at 888. Second, unlike other oil rate overcharge cases involving billions of dollars over several years, only four transactions over a six-month span are at issue here, a relatively minor violation. *Compare In re Department of Energy Stripper Well Exemption Litigation*, 578 F.Supp. 586 (D. Kan. 1983); *United States v. Exxon Corp.*, 561 F.Supp. 816 (D.D.C. 1983). Finally, even though it purports to represent the injured customers of NEPCO, the Government has totally failed to prove the overcharges were passed on and has been unable to identify specific victims who were harmed by the illegal sales to PETCO.

Under these circumstances, it would be inequitable for the Citronelle companies to bear the entire burden of an honest mistake. This conclusion finds support in Restatement, *Restitution* § 142, which states:

> (1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
>
> (2) Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.

Since whether the PETCO transactions were valid "export sales" was an open question of law which could only be determined after the fact, it is apparent that defendants were no more at fault in the situation than the DOE officials. Indeed, more than four years elapsed before

DOE itself concluded that the sales were not exempt from price controls and filed this counterclaim for restitution. Meanwhile, defendants rendered unto Caesar $3,369,481.00 in state and federal income taxes, diminishing by almost one-half the amount the Citronelle companies ultimately profited from the sales.

Accordingly, to prevent double recovery by the Government and to do justice among the parties, the Court finds that the proper amount of restitution here is the amount of the overcharges less the amount of taxes paid on those gains. *See* Restatement, *Restitution* § 158, Comment b (recognizing that the principle of equitable adjustment allows one to be credited for expenditures, such as payment of taxes, especially where expenditures inure to claimant's benefit). Subtracting $3,369,481.00 from $6,769,956.76 thus yields counterclaimant a total recovery of $3,400,475.76. That figure is quite close to the net after-tax profits the Citronelle companies realized on the disputed transactions, so awarding that sum effectively strips defendants of their ill-gotten gains without penalizing them unduly for an honest error.

Counterclaimant is also entitled to recover from Chamberlain to the extent that he personally profited as a central figure in the illegal transactions. *Citronelle-Mobile Gathering, Inc. v. O'Leary, supra* at 881. The parties have stipulated that Chamberlain earned $147,828.59 in excess of the applicable ceiling prices for domestic oil sales. Less the $8,869.71 he paid in state severance taxes, Chamberlain personally netted $138,958.88 from the PETCO sales, and counterclaimant is thus entitled to restitution in that amount. The Court declines to reconsider whether Chamberlain could be held personally liable for the $3.4 million awarded against his companies. Both parties had an opportunity to appeal this Court's ruling on Chamberlain's personal liability to TECA, but neither one did so. Therefore, this Court's

previous ruling will remain undisturbed as law of the case.

Counterclaimants are also entitled to recover interest on the foregoing sums. See Restatement, *Restitution* § 156; *United States v. Exxon Corp.*, 773 F.2d 1240 (Em.App. 1985), *aff'g United States v. Exxon Corp.*, 561 F.Supp. 816 (D.D.C. 1983). Only in this manner can full restitution be achieved, for the Citronelle companies have enjoyed unimpaired use of their ill-gotten gains for almost a decade. Interest shall be computed from the date of the transactions at the appropriate legal rate for judgments at that time and compounded thereafter in accordance with the legal rate for judgments in succeeding years. Post-judgment interest shall be allowed in accordance with 28 U.S.C. § 1961 (1982).

B. *Method of Disbursing Restitution Funds*

The Government contends that the restitution funds should be turned over to it for disbursement through administrative proceedings. DOE maintains it is equipped to handle the task through its Subpart V procedures, 10 C.F.R. § 205.283. These procedures require a potential claimant to file an application for a refund, which is then processed through administrative channels.

Unfortunately, the Subpart V procedures have been heavily criticized as inadequate by commentators. *See generally* Note, *Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation*, 79 Mich.L.Rev. 1454 (1981); Note, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 Stan.L.Rev. 1039 (1980). The problem is simply that, for most consumers, the amount of any overcharge is so insignificant that the expense of pursuing a claim outweighs the potential benefit. In addition, the passage of 10 years creates almost insurmountable proof problems

for many claimants. The principal beneficiaries of the Subpart V proceedings, therefore, will inevitably be larger companies, such as utilities, which have maintained records to support a claim. As a result, this method of disbursing restitution funds will do little to aid the ultimate consumers who bore the brunt of the overcharges through increased heating bills.

Furthermore, to turn the money over to DOE for disbursement does not satisfy this Court's obligation to fashion an equitable remedy. *United States v. Exxon Corp., supra* at 1284; *Citronelle-Mobile Gathering, Inc. v. Edwards, supra* at 723. In the *Exxon* case, TECA made clear that its ruling in *Citronelle* placed the duty of creating a disbursement plan on the Court, not on a Government agency. This conclusion was also implicit in *Stripper Well, supra* at 596-97, where the court referred certain factual questions to DOE for resolution under the Subpart V procedures while retaining jurisdiction over the case for the purpose of entering final judgment.

Throughout these proceedings counterclaimant has maintained that it is representing the interest of NEPCO customers injured by the overcharges, yet it has never identified any injured customers. The time has now come for the Government to produce proof, if it has any, as to what entities or individuals are entitled to refunds from the restitution funds. If counterclaimant cannot do so, this Court must fashion an alternative remedy, perhaps by distributing the moneys to the states where most of NEPCO's customers live. Congress used such an approach in 1982 to distribute some $200,000,000 in unclaimed escrow funds collected from oil companies. *See* Warner Amendment, P.L. 97-377, § 155, 96 Stat. 1919 (1982) (one-time appropriation of funds for state use in energy assistance programs). TECA recently approved a similar judicial remedy in *United States v. Exxon Corp., supra* at 1280, 1286.

Accordingly, counterclaimant is hereby ORDERED to produce competent proof, if it can, within *ninety (90) days* of the date of entry of this Order, identifying the victims of overcharges caused by the PETCO sales. If identification of victims is not possible, counterclaimant is ORDERED to suggest a formula under which the restitution funds can be awarded to states where NEPCO customers lived during the relevant period of time.

CONCLUSION

The Clerk of Court is hereby directed to enter an appropriate judgment against counterclaim-defendants Citronelle-Mobile Gathering, Inc., and Citmoco Services, Inc., jointly and severally, in the amount of $3,400,475.76, plus interest, and against counterclaim-defendant Bart B. Chamberlain, individually, in the amount of $138,958.88, plus interest.

SO ORDERED, this 30th day of December, 1985.

/s/ [Illegible]
Chief Judge
United States District Court
Southern District of Georgia
Sitting by Designation

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

Civil Action No. 77-0101

CITRONELLE-MOBILE GATHERING, INC., et al.,
PLAINTIFFS AND COUNTERCLAIM-DEFENDANTS

v.

JOHN HERRINGTON, et al., DEFENDANTS

and

UNITED STATES OF AMERICA, COUNTERCLAIMANT

[Filed Feb. 27, 1986]

ORDER

Counterclaimant and counterclaim-defendants have both filed motions pursuant to Fed.R.Civ.P. 52 and 59, asking the Court to modify and clarify its Order of December 30, 1985, in certain respects. In accordance with those motions, the Order of December 30, 1985, and the Judgment entered thereon are hereby AMENDED, MODIFIED AND CLARIFIED as follows:

1. This Court previously ruled that the proper amount of restitution in this case is "the amount of the overcharges less the amount of taxes paid on those gains."

See December 30 Order, at 12. Accordingly, counterclaim-defendants' motion to reduce defendant Bart B. Chamberlain's liability by the amount of taxes he paid on the overcharges is GRANTED.

Although a dollar figure was not available at trial, the parties have since stipulated that Chamberlain paid $85,497 in state and federal income taxes as a result of his excess earnings from the PETCO sales. Subtracting that sum from the $138,958.88 Chamberlain received (after paying severance taxes) yields a net liability of $53,461.88.

Counterclaim-defendants' motion to absolve Chamberlain of any liability for his role in the PETCO sales is DENIED for the reasons heretofore expressed in previous Orders.

2. Counterclaim-defendants' motion to absolve Chamberlain and the corporate counterclaim-defendants of any liability for prejudgment interest is DENIED for the reasons heretofore expressed in previous Orders.

Counterclaimant's motion to use the commercial interest rates employed by DOE in administrative enforcement proceedings to calculate the amount of prejudgment interest owed in this case is DENIED.

The Court in its discretion finds that the proper rate to be used in calculating prejudgment interest is the rate set out in Ala. Code § 8-8-8 (1975). Such rate has at all times from 1974 until the present been six percent (6%), compounded annually. *See Comeg, Inc. v. Mitternight Boiler Works*, 456 So.2d 264 (Ala. 1984); *Moore v. Alabama Farm Bureau Mutual Casualty Insurance Co.*, 452 So.2d 1320 (Ala. 1984); *Burgess Mining & Construction Co. v. Lees*, 440 So.2d 321 (Ala. 1983).

Prejudgment interest shall be calculated from the date of the transactions—*i.e.*, shipment dates—and shall be allocated among the four transactions in proportion to

the overcharges associated with each transaction. The evidence at trial showed the gross and net overcharges for each shipment to be as follows:

SHIPMENT	TOTAL OVERCHARGES	NET OVERCHARGES
January 6, 1974	$2,526,881.90	$1,269,225.34
January 21, 1974	1,750,772.97	879,394.25
February 27, 1974	1,534,905.75	770,966.49
May 26, 1974	957,396.14	480,889.68
	$6,769,956.76	$3,400,475.76

The parties have stipulated that the third shipment was the one on which Chamberlain earned his excess profits. Therefore, the date from which prejudgment interest shall be calculated as to Chamberlain shall be February 27, 1974.

Post-judgment interest shall be allowed in accordance with 28 U.S.C. § 1961 (1982).

3. The judgment sums are ORDERED to be paid into the Registry of the Court pending final distribution of the funds.

Counterclaimant's motion that it be allowed to identify victims of the PETCO overcharges by using DOE's "Special Procedures for Distribution of Refunds," 10 C.F.R. § 205 (Subpart V), is and will continue to be DENIED until such time as the Government adduces proof that it can identify such victims.

Accordingly, counterclaimant is hereby ORDERED to produce competent proof, if it can, within *thirty (30) days* of the date of entry of this Order, identifying victims of the overcharges caused by the PETCO sales. If identification of victims is not possible, counterclaimant is ORDERED to suggest a formula under which restitution can be awarded to the states where NEPCO customers lived during the relevant period.

4. The Clerk of Court is hereby *directed* to amend the Judgment against counterclaim-defendants to read as follows:

Judgment is entered in favor of the United States, counterclaimant, and against counterclaim-defendants Citronelle-Mobile Gathering, Inc., and Citmoco Services, Inc., jointly and severally, in the amount of $3,400,475.76, plus prejudgment interest as set out above, and against counterclaim-defendant Bart B. Chamberlain, individually in the amount of $53,461.88, plus prejudgment interest as set out above, plus costs as taxed by the Clerk.

5. This Order constitutes a Final Judgment on the merits of the counterclaim within the meaning of 28 U.S.C. § 1291 (1982).

Accordingly, counterclaim-defendants' motion to stay execution of the judgment pending the disposition of post-trial motions is DISMISSED AS MOOT.

SO ORDERED, this 27th day of FEBRUARY, 1986.

/s/ [Illegible]
Chief Judge
United States District Court
for the Southern District of Georgia
Sitting by Designation

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS

Nos. 5-60, 5-61

CITRONELLE-MOBILE GATHERING, INC., et al.,
PLAINTIFFS-APPELLANTS,

v.

JAMES B. EDWARDS, Secretary of Energy, et al.,
DEFENDANTS-APPELLEES.

Argued Oct. 9, 1981

Decided Jan. 21, 1982

Before SPEARS, HEMPHILL and POINTER, JJ.

HEMPHILL, Judge.

This litigation involves four cargo shipments of crude oil which were sold and shipped from appellants, Citronelle-Mobile Gathering, Inc. ("Gathering"), and Citmoco Services, Inc. ("Citmoco"), to the Grand Bahamas Petroleum Company ("PETCO") in the commonwealth of the Bahamas, pursuant to four export licenses issued by the Department of Commerce. These shipments were made pursuant to agreements between Bart Chamberlain, principal officer and principal stockholder of Gathering and Citmoco, and Edward M. Carey, principal officer and/or director of Carey Energy Corporation which owned New England Petroleum Corporation ("NEPCO"). It af-

firmatively appears that PETCO, to which company the petroleum was originally shipped from the United States, is a wholly owned subsidiary of NEPCO, the final recipient of the oil in question. The oil was refined by Bahamas Oil Refiners Co. ("BARCO") which is partially owned by PETCO. The first three contracts involved a sale of approximately 765,000 barrels at $14.00 per barrel; a fourth sale was of approximately 200,000 barrels at $13.00 per barrel. In order to effectuate the sale to PETCO, appellants were required to obtain export licenses from the Department of Commerce, and did so upon the showing that the proposed exportation of crude oil would not "affect the total quantity or quality of petroleum available to domestic users. . . ." 15 C.F.R. § 377.6(b)(1); 38 Fed.Reg. 34442, 34443 (Dec. 13, 1973). The Federal Energy Office participated in the review and approval of the application for the export licenses, and officials of the Federal Energy Office were fully informed as to the details of the transactions.

Spawned by newspaper articles appearing in the summer of 1975, an initial investigation was had into the possible involvement of the Governor of New York resulting in a grand jury determination, with ultimate acknowledgement by the Department of Justice, that there was no credible evidence to support any allegations against that individual. A Congressional investigation also concluded that there was no substance to the allegations against the Governor of New York. In January, 1976, the Federal Energy Agency ("FEA") instituted another investigation involving, primarily, the enforcement of certain subpoenas, and during that litigation, in November of 1978, defendant filed a second allowed counterclaim under the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 n. § 209[1] ("ESA")

[1] In addition to . . . injunctive relief the court may also order restitution of moneys received in violation of any . . . order or regulation.

on behalf of the alleged overcharge of the domestic customers of NEPCO.

On cross motions for summary judgment, the district court granted partial judgment for the United States. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F.Supp. 871 (S.D.Ala.1980). From this judgment appellants pursue an interlocutory appeal presenting four issues for decision at this level.

The case and all incidental issues revolve around the central question of whether the export exemption applies. If the sales are to be treated as exports, and/or domestic sales for export crude petroleum subject to the export licenses regulations of the Department of Commerce ("DOC"), then such are expressly excluded from FEA's petroleum allocation regulations; 10 C.F.R. § 211.1. Prices charged for export sales, including sales to a domestic purchaser which certifies the product is for export, are also exempt from FEA's petroleum pricing regulations; 10 C.F.R. § 212.53. The question of whether the export exemption applies suggests the conclusion that if appellants are allowed to take advantage of what appeared to be a loophole in the law, then the whole concept of consumer protection, as found in the Department of Energy's ("DOE") regulations, may be frustrated. We consider in this light.

THE SALES OF AMERICAN CRUDE OIL BY AN AMERICAN FIRM TO THE WHOLLY OWNED SUBSIDIARY OF ANOTHER AMERICAN FIRM WERE NOT "EXPORT SALES"

Appellants have urged this Court to consider the "plain" or "commonly accepted" meaning of the term "export sale". This Court cannot concentrate on individual words and ignore a consideration of the context in which the term appears. In order to determine the precise meaning of the term "export sale" it is imperative that strong consideration be given to the entire transaction giving

rise to the "export sale" [2], coupled with a consideration of the purpose for which this regulation was intended.[3]

As stated earlier, appellant firms, both American corporations, sold crude oil produced in the United States to PETCO, a wholly-owned foreign subsidiary of another American corporation (NEPCO). Once refined, the same quantity of refined products was returned, not only to the United States, but to the *refiner's parent corporation* in the United States. This transaction, admittedly clever, is not original. In 1883, the Attorney General issued an opinion evolving from circumstances in which whiskey was to be shipped from the United States to Bermuda with the intent that it be returned to the United States after it had been aged. That opinion, holding there was no exportation, was later quoted with approval by the Supreme Court. *See Swan & Finch v. United States*, 190 U.S. 143, 145, 23 S.Ct. 702, 703, 47 L.Ed. 984 *quoting* 17 Op.A.G. 579, 583 (1883). The Court stated:

> [T]he legal notion . . . of exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country.

Id. at 145, 23 S.Ct. at 703. *See also United States v. 200 Watches*, 66 F.Supp. 228, 230, (S.D.N.Y.1946). In the case at bar, appellant's intention was that the refined products attributable to the Chamberlain firm's crude oil be returned to the United States. There was never any intention that the crude oil be joined with the mass of things in the Bahamas.

The apparent plan of appellant's transaction becomes much clearer when considered along with the purpose and actual requirements of the pertinent regulations.

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[2] *E.g., Tenneco Oil Co. v. FEA*, 613 F.2d 298, 303 (TECA 1979).

[3] *E.g., United States v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979).

Exports, and domestic sales for export, of crude petroleum subject to export license regulations of the Department of Commerce were, and are, excluded from FEA's petroleum allocation regulations. Prices charged for these "export sales", are exempt from the FEA's petroleum pricing regulations. (10 C.F.R. § 212.53 provides: The prices charged for export sales including sales to a domestic purchaser which certifies the product is for export, are exempt). In order to take advantage of this exemption one must follow the simple, rudimentary procedure of obtaining an export license. This involves a showing that the "total quantity or quality of petroleum available to the United States" would not be diminished. 15 C.F.R. § 377.6(b)(1). Once licensed, an exporter is free to charge whatever price the foreign market can bear. Thus, the regulations were promulgated in such a way as to, among other things, increase foreign revenue, stabilize the economy, and assure sufficient quantities of petroleum. However, when the economic reality of the transactions is examined, it is quite obvious, as the able trial judge perceived, that these transactions had precisely the effect which Congress sought to avoid in enacting the Emergency Petroleum Allocation Act of 1973 (EPAA), to wit; higher oil prices to American buyers. *Citronelle, supra* at 883.

Finally, the case of *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968), is instructive and somewhat analogous. *Concentrated Phosphate* involved foreign aid paid for by the United States, specifically sales of phosphate to the Republic of Korea financed by the Agency for International Development. The Court faced the question of whether the associations made the sales "in the course of export trade" within the meaning of the Webb-Pomerene exemption, 15 U.S.C. §§ 61 *et seq.*, to the Sherman Act. The exemption allows the formation of joint associations in order to compete with foreign cartels in export trade. In making its decision the Su-

preme Court examined the purpose of the act in light of transactions occurring in attempts to take advantage of the Act. It is important to note that there is great similarity in the purpose of the DOE's "export sales" exemption and that of the Webb-Pomerene Act. In the DOE exemption, price controls were implemented to, "benefit United States consumers and the domestic economy." FEA Ruling 1975-7, 40 Fed.Reg. 30037 (July 17, 1975). Likewise, in dealing with the Webb-Pomerene Act, the Court, in *Concentrated Phosphate*, noted:

> It is clear what Congress is doing; it thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers. Cf. *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 211, 65 S.Ct. 1120, 1128, 89 L.Ed. 1554 (1945). The validity of this economic judgment is not for us to question, but it is quite relevant in interpreting the language Congress chose. The question before us is whether Congress meant its exemption to insulate transactions initiated, controlled, and financed by the American Government, just because a foreign government is the nominal "purchaser." We think it did not.

Id at 208, 65 S.Ct. at 1127. As a result of this analysis the Court held:

> [T]he framers of the Webb-Pomerene Act did not intend that Americans should be deprived of the main benefits of competition among American firms. Since in all relevant aspects the transactions involved here were American, not Korean, we hold that they are not "export trade" within the meaning of the Webb-Pomerene Act.

Id at 209-10, 65 S.Ct. at 1127-28.

We conclude and so hold, that the trial judge was correct in his conclusion that these transactions were not "export sales" within the meaning of the EPAA. Appellant's transactions involved a mere hint of foreign participation, were designed so as to take advantage of the established regulations and were completely repugnant to Congress' intent.

APPLICATION OF ALABAMA'S ONE-YEAR STATUTE OF LIMITATIONS WOULD FRUSTRATE EFFECTIVE ENFORCEMENT OF THE ESA, EPAA AND RELATED STATUTES

This Court is faced with the question of whether Alabama's one-year statute of limitations[4] should be applied. If this statute were applied, the Government's claim for restitution would be altogether barred.

We find there is no specific federal statute of limitations applicable to § 209 actions; there are various guidelines available which enable this Court to determine whether the Alabama statute applies. Specifically, the Supreme Court

> has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state laws will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson v. Railway Express Agency*, 421 U.S. 454, 456, 95 S.Ct. 1716, 1718, 44 L.Ed.2d 295 (1974). State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

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[4] That statute provides a one-year limitation on "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . ."

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 2454, 53 L.Ed.2d 402 (1977). It is also clear that state statutes of limitations must not be applied if such application would "frustrate or interfere with the implementation of national policies." *Id.* at 370-71, 97 S.Ct. at 2456-57.

The primary underlying policy of the ESA is to insure effective enforcement of the pricing regulations, on a national scale. *See Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980). As an aide to such enforcement the DOE has the right to seek restitution in ESA enforcement actions. In fact, restitution is "appropriate and necessary to enforce compliance." *Univ. of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1070 (TECA 1972). The right to enforce compliance to such restitution of price overcharges is equitable, *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), and suits to enforce equitable rights created by federal law are not subject to state statutes of limitations, even if brought by a private party. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

Additionally, we must consider the overall effect of borrowing state statutes of limitations in cases such as the one at bar. Effective nationwide enforcement of the ESA must not be hampered by the various periods of limitations throughout the fifty states. Certainty as to the length of the limitation period will only facilitate the implementation of this national policy. Thus, we affirm the trial judge's decision to refuse the application of Alabama's one-year statute of limitations.

RESTITUTION IS APPROPRIATE RELIEF

Having agreed with the district court's determination that appellants have violated the provisions of the ESA, EPAA and the regulations promulgated thereunder which establish the ceiling price for the four sales of

domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. part 150 and 10 C.F.R. part 212, this Court reviews the relief fashioned by the district court judge. The counterclaim seeks judgment requiring plaintiffs to pay into an escrow account, "for subsequent distribution to NEPCO customers", the excess charges. Allegations place the sum between $6,000,000.00 and $9,000,000.00, exclusive of interest and civil penalties. No accurate calculations are before the Court at this time. This Court concurs in the district court's conclusion [499 F.Supp. at 885] that good faith, as opposed to willfulness, characterized plaintiff's dealings with the Department of Commerce.

An immediate confrontation with the method/process of enforcement emerges. Neither appellants, nor various *amici* attack restitution as being outside the scope of relief authorized, rather, they insist the decision ordering restitution to the United States Treasury is beyond the district court's authority. The Court finds on this issue no justification for allowing plaintiffs to retain their illegal gains.

The district court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had "all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction"; *Porter, supra*, 328 U.S. at 398, 66 S.Ct. at 1089, and has power, "to do equity and mould each decree to the necessities of the particular case"; further, "It may act so as to adjust and reconcile competing claims . . . so as to accord full justice to all the real parties in interest . . . ." The authority inherent in the equity powers guarantees complete rather than truncated justice. *Camp v. Boyd*, 229 U.S. 530, 551, 33 S.Ct. 785, 793, 57 L.Ed. 1317 (1913). The power of a district court to require restitution, as was pronounced in *United States v. Lieb*, 333 F.Supp. 424 (W.D.Tex. 1971), was specifically endorsed and ratified by Public

Law 92-210[5] (Sec. 209), but nothing has been pronounced as to payment to the United States Treasury. Federal district courts unquestionably possess broad discretion in fashioning equitable remedies, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764, 96 S.Ct. 1251, 1264, 47 L.Ed.2d 444 (1975) but, as contemplated in the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, "so far as possible, and restored to a position where they would have been had it not been for" the unlawful violation, such as was practiced here. It follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved.

We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged. Clear, however, is the fact that the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that specifically authorizes restitution, but makes no provision for direct payment to the treasury, we turn to *University of Southern California, supra*, which ordered refunds of excess charges for football tickets.

> While this Court recognizes the considerable burden that such a refund demand places . . . we recognize also the right of the agencies to require it.

Id. at 1070.

We believe such a process to be a reasonable application of the power of the district court. This is obviously in the contemplation of defendant as evidenced by its request for relief. Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is "a by-product of the

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[5] *See* U.S. Code and Congressional News, 92d Congress, 1st Session (1971) pp. 2283, 2291.

agency's effort to re-establish compliance with its regulatory scheme." *Bulzan, supra* at 282. The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:

> Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.

Restatement of Restitution, Sec. 1, Comment e (1937), cited in *Sauder v. Doe*, 648 F.2d 1341 (TECA 1981). The district court properly held that because NEPCO and PETCO aided and abetted the Chamberlain firms in their violation of the price regulations, for their material benefit, they are barred by "unclean hands" from seeking or recovering any of the illegal profits.

Apparently, however, restitution payments may be made to the Treasury under special order of the court. The Treasury holds the payments in a "Deposit Fund Account" to be paid out at the direction of DOE. *See* General Accounting Office Procedures Manual, Title 7, Sec. 4.10(6). *Cf. Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971).[6] Receipts contained in those accounts are subject to a "constructive trust," *Emery v. United States*, 186 F.2d 900, 902 (9th Cir. 1951); are treated as liabilities of the United States, *see e.g.*, Treasury Combined Statement of Receipts, Expenditures, and Balances of the United States Government, Fiscal Year 1978 at 3,12; and for their disburse-

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[6] *See also* 28 U.S.C. §§ 2041, 2042.

ment, an appropriation is not required. This affords an opportunity for DOE to pursue those proposals suggested by its request that the Court

> Enter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account for subsequent distribution to NEPCO customers, a sum of . . .

As determined by the district court the Government has demonstrated injury to a class of persons. Whether the defendant will ask to amend under Rule 15, Federal Rules of Civil Procedure, institute interpleader under Rule 22 and related statutes, or proceed otherwise is not revealed in the record before this Court. Suffice it to note that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds.

The Order of the district court is modified and the case remanded to that forum for an Order directing the application to the General Accounting Office Procedures, and/or the furnishing of a plan for the "Deposit Fund Account," and/or other appropriate procedures, to be approved by the district court.

Meanwhile, within such time as the district court may direct, the parties will enter a stipulation, failing which, file appropriate motions in that forum.

THERE IS NO FACTUAL BASIS FOR RECUSAL BY THE DISTRICT JUDGE

The grounds for recusal in this case were based entirely upon the unsupported assertion, of a United States' Attorney's unverified opinion, made at a social gathering. Regardless of whether it was a statement of the Attorney's opinion,[7] the motion failed to meet the

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[7] The attorney later recanted and stated he had no reason to believe the judge acted improperly or was biased, acknowledging the statements were "totally baseless and unfair."

requirements of 28 U.S.C. § 455 and of 28 U.S.C. § 144. The motion was entirely without integrity, in addition to being untimely.

The issue was not urged by appellants. We find no justification for lengthy discussion. The findings of the district court are adopted as the findings of this Court.

The judgment of the district court is affirmed except as modified by the opinion of this Court, and this case is remanded to the district court for further proceedings in keeping with this opinion.

AFFIRMED AS MODIFIED.

POINTER, Judge, concurring in part, dissenting in part:

A. *Disqualification.*

I agree that there was no error in denying appellants' motion for disqualification under 28 U.S.C. § 455(a) I do not, however, find fault in the timing of the motion. Rather, I believe the motion—premised upon gratuitous speculation by opposing counsel as to possible bias of the judge, comments which the attorney later acknowledged to have been "totally baseless and unfair"—lacks a sufficiently colorable factual basis for any reasonable question to have been raised concerning the judge's impartiality.

B. *Limitations Period.*

I also concur in the conclusion that the government's claim for restitution was not barred by Alabama's one-year statute of limitation. As was true with the back pay claims presented by the government in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 58 L.Ed.2d 402 (1977), such a limitations period would frustrate the implementation of national policies involved in the pricing regulations here in issue. The Supreme Court recognized in *Occidental* that in some

circumstances a defense of laches might be appropriate; but the appellants have not here even argued that the trial judge was in error in finding that the defense of laches had not been established.

C. *Applicability of Price Controls.*

I must respectfully dissent, however, from the affirmance of the ruling that the sales to PETCO in 1974 were not "export sales" exempt from domestic price controls. While the imposition of price controls on these transactions might now appear to have been appropriate as a matter of policy, the regulations in place at the time the sales were contemplated and consummated did not limit the prices that PETCO might be charged, a conclusion which government officials had consistently, if begrudgingly, acknowledged prior to filing of the amended counterclaim in the present litigation in 1978.

The essential facts of the proposed transactions, including the price to be charged PETCO and the importation of a like quality of refined products into the United States, were shown in the applications for export licenses reviewed by the Petroleum Products Exception Committee, which included representatives from the FEO. As the prices exceeded permissible domestic levels, the Department of Commerce contacted FEO's General Counsel, who offered no objection to the proposed transactions and advised that there appeared to be no legal basis for denying the applications. The export licenses were granted, and there has been no suggestion in this litigation that those licenses were other than valid and proper.

The transactions were later scrutinized by attorneys from a United States Attorney's office, from the Department of Justice, and from the FEA. In terminating that investigation, it was the opinion of each attorney that "if petroleum was exported pursuant to a valid export

license, . . . the FEA price regulations did not apply to that sale."

Similarly, in an attachment to a letter to a Congressional committee investigating the transactions, the Administrator of the FEA wrote:

> Crude oil can be exported only pursuant to a valid export license. The FEA regulations have always provided that crude oil (or any refined product) sold for export is exempt from both FEA allocation and pricing regulations. 10 C.F.R. §§ 211.1(b)(1), 212.53(a). Therefore, assuming there is no other factor bearing on the issue, the sale of crude oil by a U.S. producer to a foreign refiner for export pursuant to a validly issued export license is exempt from U.S. price controls and can occur at whatever price the parties agree upon.

The interpretation of a regulatory system by those charged with its enforcement should be given great deference by the judiciary, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), particularly with respect to a contemporaneous construction by those charged with setting the machinery of a new program in motion, *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 1075, 43 L.Ed.2d 279 (1975). See also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68, 100 S.Ct. 1932, 1938-39, 64 L.Ed.2d 593 (1980). This principle is not vitiated by the fact that the government agency may have at some later time in new interpretations or in the course of litigation attempted to advocate a change of its views. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-45, 97 S.Ct. 401, 410-12, 50 L.Ed.2d 343 (1976); *Norwegian Nitrogen Produces Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). Nor, inasmuch as these particular transactions were scrutinized by the affected agencies and found to constitute exempt "export sales", do I find persuasive the

appellees' efforts to cite as if applicable the interpretation of the regulations given in factually distinguishable situations. *Cf. Tesoro Petroleum Corp.* Interpretation No. 78-10, Enforcement Manual (CCH) ¶ 56,400 (March 24, 1978) (equal volume exchange); FEA Interpretation 1977-16, 42 Fed.Reg. 31151 (June 20, 1977) (sale to instrumentality of United States for its consumption abroad).

The construction of the regulatory system by the administrative agency prior to the current litigation was, moreover, consonant with—if not mandated by—the language of the regulations, however adequately or inadequately those regulations may have considered the effect of a tri-partite arrangement such as here involved. It can hardly be doubted that the sales by the appellants to PETCO—sales of crude oil produced by a domestic company in the United States to an unrelated foreign company located in the Bahamas, for refining at Bahamian facilities—would in ordinary usage be considered an "export sale," the words of 10 C.F.R. § 212.53(a). This would be so even though a like quantity of refined products was destined by prearrangement for shipment into the United States—as an "import" free from price controls, to use the words of 10 C.F.R. § 212.53(b)—to a third company which the trial court found, under rulings not challenged in this interlocutory appeal, to be independent from and not an alter ego of the Bahamian company.

To be sure, words like "export sale" or "export trade" are not immune from consideration in the light of recognized principles of statutory and regulatory construction. See, *e.g., United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed. 344 (1968).[1]

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[1] In *Concentrated Phosphate,* sales of phosphate to the Republic of Korea in which an agency of the United States government "selected the commodity, determined the amount to be purchased, controlled the contracting process, and paid the bill," 393 U.S. at 208, 89 S.Ct. at 366, were held not to be exempt from the anti-

I find unpersuasive, however, appellees' attempt to disavow its earlier interpretation that these sales to PETCO were "export sales" exempted from price controls, while continuing to acknowledge that they were "exports" exempted from the allocation regulations by 10 C.F.R. § 211.1(b)(1). It is unnecessary to consider the extent to which total congruency between the allocation and price regulations should be required; it is sufficient to note that an inconsistent interpretation such as appellees suggest should hardly be favored. As this Court has said, "Congress was conferring authority . . . to regulate only the price of that which it was mandating the President to allocate." *Shell Oil Co. v. FEA*, 527 F.2d 1243, 1246 (TECA 1975). One can hardly reconcile the present ruling, treating the transactions for purposes of price controls as if PETCO were a domestic refiner, with the earlier decision of the agency that for purposes of the allocation regulations "it is . . . not appropriate that [PETCO's refinery] which is located in a foreign country be treated as if it were located in the United States." See *New England Petroleum Corp.*, 2 FEA ¶ 83,136 at 83,429 (May 2, 1975), *aff'd*, 2 FEA ¶ 80,468 (August 7, 1975), *modified*, *New England Petroleum Corp. v. FEA*, 455 F.Supp. 1280 (S.D.N.Y.1978).

Nor is there merit in the argument that a distinction in treatment of the same transaction under the allocation and price regulations can be justified on the basis that the exemption in the former is for "exports" while that

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trust laws under the Webb-Pomerene Act. The Supreme Court, viewing the transactions as ones in which "the United States was, in essence, furnishing fertilizer to Korea," concluded that "it stretches neither the language nor the purpose of the Act" to hold that the imputed sales to the United States were subject to the anti-trust laws. *Id.* Unlike the case *sub judice*, the court was not in that decision adopting a construction which would be at variance with interpretations adopted by the agency charged with enforcement of the law or in conflict with the other portions of the regulatory system.

in the latter is for "export sales." The difference is merely stylistic, as demonstrated by the fact that the same subsection of the pricing regulations also exempts sales to a domestic producer certified to be "for export", 10 C.F.R. § 212.53(a), and the next subsection of the regulations provides an exemption for "imports", 10 C.F.R. § 212.53(b). Indeed, as appellants note, the purported distinction based upon joinder of the words "export" and "sales" in § 212.53(a) would presumably mean that appellants' sales to PETCO were subject to price controls while PETCO's sales to NEPCO were not—with the bizarre result that, while NEPCO and its domestic customers would have remained subject to the higher prices, the so-called improper profits could have been made by a foreign company such as PETCO but not by domestic companies such as the appellants.

Those writing the regulations have, moreover, shown that they know how to provide special treatment, if that is desired, where there are interrelated transactions. See, e.g., 10 C.F.R. § 212.82 (definition of "Exchange" in price regulations for refiners), § 212.92 (definition of "Matching purchase and sale" in price regulations for resellers and retailers). Indeed, after the transactions now in question had occurred, the regulations concerning export licenses were amended to provide, *inter alia*, for the consideration of the potential effect upon domestic prices prior to issuance of the license. See 15 C.F.R. § 377.6 (d)(1).

D. *Propriety of Restitution*

While the sales to PETCO were not, in my view, subject to price controls under the regulations as promulgated and construed by the enforcement agency, the majority's treatment of the issues concerning a remedy is more disturbing.

The trial court held that the amounts charged PETCO in excess of domestic price levels, estimated at $6,000,000

to $9,000,000, should be paid by the appellant sellers to the United States. The payment is not to be made as a civil penalty or fine; indeed, the trial court absolved the appellants from liability for the relatively modest civil sanctions imposed under 12 U.S.C. § 1904 n. § 208 for violation of the regulations. Rather, the award was described as one of "restitution" under § 209 of the Act, and was ordered paid into the treasury of the United States "because it cannot flow to the wronged individuals and because permitting the retention of the illegal overcharges would utterly frustrate the purposes of the EPAA." The court reached this conclusion after having decided that (1) restitution should not be made to PETCO, the company charged the excessive price by appellants, because of "unclean hands"; (2) restitution should not be made to NEPCO, which purchased from PETCO the refined products, for a like reason; (3) restitution should not be made to most of NEPCO's customers because they passed on the overcharges to their customers; and (4) restitution could not, as a practical matter, be fairly apportioned among the vast number of consumers who ultimately bore the damage of higher prices. In a succinct statement of the rationale, the trial judge noted:

> "Realistically this holding very simply means that, since the people are sovereign, and where large numbers, here millions, have been injured, the peoples' institution, the United States government, will recover the disgorged wrongful profits."

The majority of the opinion of this court concludes, quite correctly in my view, that payment to the treasury of the United States "is not restitution in the true sense of the word or in the objectives of the statutes here involved." Restitution is a remedy in which restoration of the parties to their prior positions is sought to be effected by measuring relief on the basis of the improper benefits to the wrongdoer rather than on the basis of the damages

to the injured party; it does not change traditional concepts as to the identity of the persons committing the wrong or sustaining the injury.

Nonetheless, the opinion apparently still leaves standing, under some vaguely defined notion of general equitable principles, the proposition that restitution should be paid to the government, to be held as if a constructive trust subject to directions of DOE. According to the instructions on remand, the government would have a "duty to try to ascertain those overcharged, and refund them, with interest, from the restitution funds;" it is left open for the district court to determine the extent, if any, to which the court would be involved in the implementation of a plan for distributing the amounts paid to the treasury. Any amounts not allocated and distributed to those found to have been overcharged—a task which the trial court has already found to be impracticable—would presumably escheat for all practical purposes to the government.

The approach of the majority, while lacking the simplicity and directness of that adopted in the district court, suffers in my opinion from the same fatal flaw—prescribing a judicial remedy for violation of the regulations which is beyond that authorized in the Congressional enactment or the administrative regulations.[2] In place of the remedy constructed by the district court, which in essence intermingles the provisions of the Act relating to civil penalties with those relating to restitution, the panel

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[2] While not mentioned in the opinion of the district court or that of the majority, it may be noted that in 1979 the regulations were amended to provide special procedures for refunds *administratively* found due to injured persons where either the identity of the persons or the amount of the refunds could not readily be ascertained. 10 C.F.R. § 205.280 *et seq.*, 44 Fed. Reg. 8566. These regulations permit the rejection of claims too small to warrant individual consideration, § 205.286(b), and the payment of undistributed funds to the treasury or in any other manner approved by the OHA, § 205.287(c).

has substituted a remedy which in essence melds the concept of a parens patriae action with that of a fluid recovery. In my opinion neither approach is warranted by applicable law and precedents [3] and each would have a far-reaching, untoward jurisprudential consequences.

If, as the district court held, restitution should not or can not be paid to those who purchased the products at an illegally high price—and if it is appropriate that this issue be considered by this court on this appeal—then I would hold that restitution should not be ordered, even if the result would be the retention of illegal gains.

I do not believe, however, that the question of restitution should be addressed on this interlocutory appeal under 28 U.S.C. § 1292(b). There has been no cross-appeal by the government under § 1292(b), and there is no final judgment in the district court from which appeals might be taken on all issues which bear upon the proper relief, if any, to be granted on proof of statutory violations. Whether, for example, the appellants should have been absolved from liability for any civil penalty is not presently before this court. Nor are the many rulings of the district court—such as the impracticability of determining those who were wronged by the alleged overcharge, the barring of PETCO and NEPCO from any award on

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[3] While there have been cases providing for payment of funds into the treasury for distribution to those injured by statutory violations—such as *Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3rd Cir. 1971); *Hansen v. United States*, 340 F.2d 142 (8th Cir. 1965); *Emery v. United States*, 186 F.2d 900 (9th Cir. 1951)—these have been situations where the identity of the payees and the amounts to be paid them had been resolved in the judicial proceedings brought by the government. Perhaps the case most nearly offering support for the panel's approach is the unappealed district court decision in *Oakland Raiders v. Office of Emergency Preparedness*, 380 F. Supp. 187 (N.D. Cal. 1974), directing that the balance of overcharges on football tickets that could not be paid to the persons overcharged be disgorged through reduction in the price of future ticket sales.

the basis of "unclean hands", and the barring from any award those which passed overcharges through to their customers [4]—which may well affect the propriety of an award of restitution. I would therefore hold that the question of restitution should not be considered on this appeal and would vacate the permission previously given for interlocutory appeal of this issue as having been improvidently granted.

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[4] But see *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 609 F.2d 497 (TECA 1979).

APPENDIX E

UNITED STATES DISTRICT COURT
S. D. ALABAMA, S. D.

Civ. A. No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., et al.,
PLAINTIFFS

v.

JOHN F. O'LEARY, ETC., et al., DEFENDANTS

Sept. 15, 1980

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COUNTERCLAIM

PITTMAN, Chief Judge.

This action was filed by Citronelle-Mobile Gathering, Inc. and others, requesting declaratory and injunctive relief against officials of the Federal Energy Administration, now the Department of Energy, and the Secretary of the Department of Commerce.

The government filed a counterclaim seeking to compel Bart B. Chamberlain, Jr. (Chamberlain), Citronelle-Mobile Gathering, Inc. (Gathering), and Citmoco Services, Inc. (Services) (hereinafter sometimes collectively referred to as "defendants"), to make restitution of alleged overcharges received relating to four transfers of

crude petroleum to Grand Bahamas Petroleum Company, Ltd. (PETCO), a wholly owned subsidiary of the New England Petroleum Corporation (NEPCO), between December 20, 1973 and May 26, 1974. The first three shipments were sold at a price of $14.00 per barrel and the final shipment at $13.00 per barrel, prices admittedly higher than the price the defendants could lawfully have charged had the sales been made in the United States to United States purchasers.

The government seeks to recover the difference between the payments the defendants actually received and the maximum lawful selling prices allowed by the provisions of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (ESA); the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (EPAA); and the regulations promulgated thereunder which establish the ceiling price for the first sale of domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. Part 150 and 10 C.F.R. Part 212. The government also seeks a declaratory judgment that the defendants violated the laws in question, and to recover civil penalties and costs from the defendants.

All parties have filed motions for summary judgment on the counterclaims. They informed the court there were no disputed facts. None were filed as required by Local Rule 8:

> When a motion for summary judgment is filed . . . if it is contended that there are material factual disputes, [the party] shall point out the disputed facts appropriately referenced . . . . Failure to do so will be considered an admission that no material factual dispute exists.

FINDINGS OF FACT

The defendants Gathering and Services are corporations duly organized and existing under the laws of the State

of Delaware, having their principal place of business in Mobile, Alabama. The companies are commonly controlled and were, at all times pertinent hereto, engaged in the business of purchasing crude oil produced principally in the Citronelle field in Mobile County, Alabama, and reselling that crude oil at Mobile, Alabama. Defendant Chamberlain is an officer, director and the principal stockholder, owning a majority of the stock, of the companies. He is a citizen and resident of the State of Alabama.

James R. Schlesinger, Secretary of the Department of Energy, is successor to John F. O'Leary, former Administrator of the Federal Energy Administration (FEA); Donald E. Allen was Regional Administrator, Region IV of FEA, at the time of commencement of this action. Juanita M. Kreps is the Secretary of Commerce of the United States.

Pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.*, and Executive Order 11748, the Federal Energy Office (later the FEA and now the Department of Energy) issued regulations governing the allocation and pricing of crude oil and refined petroleum products, published at 10 C.F.R. Parts 205, 210, 211, 212 (effective January 14, 1974). At all times relevant hereto, prior to the effectiveness of the FEA regulations, pricing and crude oil was subject to regulations of the Cost of Living Council (CLC), 6 C.F.R. Part 150 issued pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

Exports, and domestic sales for export, of crude petroleum subject to export license regulations of the Department of Commerce (DOC) were and are expressly excluded from FEA's petroleum allocation regulations, 10 C.F.R. § 211.1. Prices charged for export sales, including sales to a domestic purchaser which certifies the product is for export, are exempt from FEA's petroleum pricing regulations. 10 C.F.R. § 212.53.

From time to time during the period December 1973 to April 1974, the defendant companies contracted with Grand Bahamas Petroleum Company, Ltd. (PETCO) to sell crude oil to PETCO, at a price higher than the domestic price permissible under otherwise applicable FEA regulations, for refining in the Bahamas at a refinery partly owned by PETCO. During this period applications for a license were made to and approved by DOC as follows:

On or about December 20, 1973, Gathering filed an application for a license to export 250,000 barrels of crude oil to PETCO in the Bahamas. On or about December 21, 1973, this application was approved and a validated export license (No. C-31226-701-1) issued on December 26, 1973, as requested in the application.

On or about December 20, 1973, Gathering filed a second application for a license to export 250,000 barrels of crude oil to PETCO in the Bahamas. On or about January 2, 1974, the second application was approved and validated export license (No. B 400102-266-1) issued as requested in the application.

On or about January 17, 1974, Gathering filed an application to amend the first application to include an additional quantity of crude oil, which amendment was approved on January 18, 1974.

On or about February 22, 1974, Gathering filed an application for a third license to export 250,000 barrels of crude oil to the Bahamas. On or about February 25, 1974, the third application was approved and a validated export license (No. C-40226-703-1) issued to Gathering as requested in that application.

On or about April 2, 1974, Services filed an application for a license to export 250,000 barrels of crude oil to the Bahamas. On or about April 12, 1974, this fourth application for export license was approved and a validated export license (No. 40416-708-1) issued on April 15, 1974,

for the shipment of 184,000 barrels of crude oil to the Bahamas.

Each application for export license disclosed that a volume of refined petroleum equivalent to the quantity of crude oil to be exported would be re-exported from the Bahamas to the United States by PETCO. The applications for the export licenses and the amendment issued to Gathering and Services truthfully set forth all facts upon which the Office of Export Administration of DOC issued the export licenses and the amendment. No export license or amendment thereto was issued to or approved for the defendant companies or either of them, or for Bart B. Chamberlain, Jr., at any time in 1973 or 1974 other than those above identified. None of the export licenses or amendments thereto identified above was at any time revoked or cancelled.

Pursuant to the four export licenses issued to the defendant companies above identified, and to Commerce Department Export regulations allowing for 10% tolerance in shipments pursuant to export licenses, crude oil was shipped from Mobile, Alabama, to Freeport, Bahamas, during the period January 1974 to May 1974 as follows:

a. On or about January 6, 1974, Gathering shipped 279,000 barrels of crude oil from Mobile to Freeport.

b. On or about January 22, 1974, Gathering shipped 255,000 barrels of crude oil from Mobile to Freeport.

c. On or about February 25, 1974, Gathering shipped 231,000 barrels of crude oil from Mobile to Freeport.

d. On or about May 26, 1974, Services shipped 200,000 barrels of crude oil from Mobile to Freeport.

The defendants were paid by PETCO for the first three shipments at the agreed-upon price of $14.00 per barrel,

and for the last shipment at the agreed-upon price of $13.00 per barrel.

I. Parties to the Transactions

Defendant Citronelle-Mobile Gathering, Inc. operates an oil pipeline in the Citronelle oil field in southwest Alabama. It also purchases crude oil for resale. Defendant Citmoco Services, Inc. operates a terminal facility in the Citronelle field; it has purchased crude oil for resale as well. Defendant Bart B. Chamberlain, Jr. owns approximately 90% of Gathering, and 87.5% of Services. He owns the largest working interest in the Citronelle field among some 900 owners. Chamberlain Testimony at 18-20, 23, 50-51.

New England Petroleum Company (NEPCO) is a New York corporation with its headquarters in New York. NEPCO's primary business is the sale of No. 6 heating oil in the United States. NEPCO depended primarily, but not exclusively, for its supply of No. 6 heating oil on Grand Bahamas Petroleum Company (PETCO), its wholly-owned Bahamian-incorporated subsidiary. PETCO arranges for the refining of its crude oil by Bahamas Oil Refining Company (BORCO), a Bahamian partnership. BORCO is owned by two entities. The first is "PETCO Partnership," which is a partnership of two NEPCO subsidiaries, Grand Bahamas Petroleum Company and PETCO, Ltd., an "offshore" corporation. The subsidiaries through this partnership owns 50% and 15%, respectively, of BORCO. The remaining 35% is owned by Chevron Oil of the Bahamas, Ltd., a subsidiary or affiliate of Standard Oil of California. Costikyan Dep. at 25, 74; Covert Dep. at 9; Jackson Dep. at 29; Lauria Dep. (May 29, 1979) at 63-64.

PETCO purchased crude oil for its own account, had BORCO refine it, and sold the product to NEPCO and other companies. PETCO extended 90-day credit terms to NEPCO. The two companies performed a reconciliation

each month, disposing of the oldest invoices. NEPCO generally had a liability on the account, and would periodically transfer funds, usually by telegraph, to reduce the balance. Covert Dep. at 32; Lauria Dep. (May 29, 1979) at 16, 31-32, 73; Lauria Dep. (Aug. 1, 1979) at 53-56, Exhs. 1A-3B.

PETCO maintained funds in the normal course of business to pay its liability for purchases of crude oil. NEPCO would occasionally pay PETCO's debts. Such a transaction would be credited to NEPCO's current account. This was a standard practice between the companies. Lauria Dep. (May 29, 1979) at 30; Lauria Dep. (Aug. 1, 1979) at 54-55, 63.

The date of PETCO's formation is not in evidence. It was probably formed before 1970, the year in which BORCO was formed. Tax considerations were at least part of NEPCO's motivation in creating the PETCO subsidiary. Transcript of telephone conversation between Ted Jackson of NEPCO and Chamberlain of Dec. 27, 1973, Jackson Dep. Gov't. Exh. 4.

PETCO and BORCO initially had accounts with Barclays Bank International in New York and Freeport, Bahamas. Because the Citronelle transactions were accomplished by means of letters of credit with First National City Bank of New York, PETCO later opened an account with that bank. Each company kept separate books. Lauria Dep. (May 29, 1979) at 13-14.

Beyond NEPCO's payment of some PETCO debts, the companies shared some functions and personnel. NEPCO's concern was to maximize profits for the entire group. The internal auditing department at NEPCO audited the books for all companies within the group. NEPCO's treasury department would often assist PETCO in arranging financing and letters of credit with New York banks. Berdy Dep. at 16; Jackson Dep. at 45-46, 48-49; Lauria Dep. (Aug. 1, 1979) at 70.

Edward M. Carey, Sr. was the sole stockholder and president of Carey Energy Corporation, of which NEPCO, and therefore PETCO and BORCO, were subsidiaries. Carey was president of NEPCO, a director of PETCO, and a member of the BORCO partnership committee. Each company had its own employees for basic functions such as controller, treasurer, and supply logistics, although as noted above, NEPCO personnel were sometimes enlisted to aid in PETCO transactions. Berdy Dep. at 7-8; Costikyan Dep. at 15; Covert Dep. at 11-12, 28; Lauria Dep. (May 29, 1979) at 11-12.

Apart from sharing certain functions and personnel, it is clear that PETCO was an independent entity, and not an alter ego for NEPCO.

II. The Transactions

The four shipments of crude oil were made pursuant to an oral agreement negotiated by Edward M. Carey, Sr. on behalf of PETCO and by defendant Bart B. Chamberlain, Jr. on behalf of Gathering and Services. The agreement was implemented by three letters. The first, written on or about December 20, 1973 from Gathering to PETCO, provided for two shipments of 250,000 barrels each, on or about December 29, 1973 and January 25, 1974. The second letter, written on or about February 14, 1974 from Gathering to PETCO, provided for one 250,000-barrel shipment during February 22 to 26, 1974. The third letter, written on or about March 27, 1974 from Services to PETCO, provided for one 250,000-barrel shipment during April 6 to 10, 1974. The following shipments were made:

Date	Barrels	Invoice Price/Bbl	Price/Bbl in 60 days
1/7/74	279,213.47	4.35	9.65 (3/6/74)
1/23/74	254,640.86	5.35	8.65 (3/22/74)
2/27/74	231,442.72	5.35	8.65 (4/26/74)
5/27/74	199,812.86	5.35	7.65 (7/25/74)

Doc. No. 109; Berdy Dep. at 5; Jackson Dep. at 63-75, Gov't. Exhs. 12-15.

NEPCO paid all or part of the first invoice, and part of the second and third invoices. PETCO paid part of the second and third invoices, and all of the fourth. NEPCO's payments were credited to its account with PETCO. Berdy Dep. at 31, 39, Gov't. Exh. 12; Lauria Dep. (May 29, 1979) at 35-36, 39 Exh. 1; Lauria Dep. (Aug. 1, 1974) at 63-64, 66.

All second portions of the payments were made by means of letter of credit established in favor of Gathering and Services, and on behalf of PETCO, with First National City Bank of New York. One application for such a letter was signed by T. C. Covert as General Manager of PETCO. Ted Jackson and Denton DeBaun, NEPCO employees, negotiated the letters of credit on behalf of PETCO. Because of the overloading on the first shipment which required an amendment to the export certificate, the letter of credit had to be increased. This was done at the request of Ted Jackson in a letter of January 7, 1974 to First National City Bank, written on NEPCO stationery. Berdy Dep. at 20, 40; Jackson Dep. at 20-23, 26, 38, Gov't. Exh. 2.

At the request of First National City Bank, NEPCO guaranteed PETCO's indebtedness on the letters of credit. This was a "continuing guarantee" signed by DeBaun. NEPCO also assisted PETCO in establishing an account at that bank so that the letter of credit could be paid. Such guarantees and assistance were routine. Berdy Dep. at 24-25, 36; DeBaun Dep. at 5; Jackson Dep. at 29, 44, Gov't. Exhs. 3, 6, 7, 9.

The only question regarding these transactions which is substantially controverted is whether Carey negotiated the agreements on behalf of PETCO or on behalf of NEPCO. The government asserts that Carey negotiated on behalf of Carey Energy Corporation, NEPCO, PETCO and BORCO. Had the contracts been between the defendants and Carey Energy or NEPCO, of course, the trans-

actions would clearly have been domestic in all material elements. The government's argument, however, proves too much. Carey was a director of PETCO, and might as well have acted for PETCO as for any of his other companies. That the companies were operated for their common benefit does not permit this court to ignore their existence. There is no evidence that PETCO was not maintained as a separate entity from other members of the group, or that there was no valid business purpose for its existence. Notwithstanding the significant involvement of NEPCO in the transactions, this court finds that Carey acted on behalf of PETCO in purchasing the crude oil.

Carey aided and abetted the defendants in securing the export licenses. It must be viewed that Carey acted on behalf of his interested companies to the mutual benefit of them and the defendants.

The defendants prepared affidavits in support of their applications for export licenses, which stated that the volume of refined products available in the United States would not be reduced. These were signed by T. C. Covert for PETCO, Edward M. Carey, Sr. for NEPCO, and David M. Tappen as Vice President of both Gathering and Services. Each affidavit stated in substance

> that such crude oil will be processed in the [BORCO] refinery into various petroleum products, all of which will be exported from the Bahamas to the United States of America.

Counterclaimant's Exh. 2 (Covert affid.); *see* Counterclaimant's Exhs. 2-12.

The export licenses for the first three shipments were issued by the Department of Commerce. The fourth license, however, was issued only after negotiation with Commerce officials. Their reluctance to issue the fourth license was apparently based on two grounds; first, that the Alaskan Pipeline Act prohibited export of any oil crossing federal rights of way, and second, that domestic

refineries were operating at 76% of capacity. Meyer Dep. Exh. 1. Chamberlain, on behalf of Gathering and Services, substituted 30,000 barrels purchased in the Citronelle field from Miller Oil Company for 96,000 barrels purchased from Permian Company which had crossed a federal right of way. Chamberlain argued that the companies had relied upon the gathering of past applications in the planning for the fourth shipment. He further argued that if the license was not granted, flow from the Citronelle field would have to be stopped because of lack of storage capacity. This would have resulted in a permanent loss of part of the oil in the field, because the system is operated by water recovery.

The license was issued for 184,000 barrels plus or minus ten percent, or 250,000 barrels adjusted as described above. Meyer testified that the Department of Commerce granted the fourth application only because it concluded that it had no choice under its regulations:

> We did not specifically spell out in the regulations how we would handle applications for export of crude oil that did not cross federal rights of way, and furthermore, we had previously issued licenses for three more or less identical transactions, and the phase of the regulations, and the phase of our practice, we were in no good legal position to say no to the fourth application.

Meyer Dep. at 22.

In a memorandum concerning the fourth application dated April 24, 1974, Meyer noted that

> Price was not considered in the processing of the three applications noted above. New information provided on March 8, 1974, by the Federal Energy Office (FEO) gave cause to hold the April 2 application submitted by CITMOCO Services, Inc. The FEO has reason to believe, and IRS is presently investigating,

> that the applicant may be violating FEO price and supply regulations.

Meyer Dep. Exh. 1 at 2-3.

III. Delegation of Authority

A letter of December 10, 1973 from Secretary of Commerce Frederick B. Dent to William E. Simon, head of the Federal Energy Office, states:

> This will confirm your decision of Friday afternoon directing that the Department of Commerce initiate a system of export controls on petroleum products to fulfill the President's responsibility under "The Emergency Petroleum Allocation Act of 1973."
>
> To simplify administrative procedures and avoid the necessity of publishing a new set of rules for comment, we propose moving under the authority granted us under the Export Control Act, but will fulfill in toto the export controls required by the Emergency Petroleum Allocation Act of 1973.

This letter establishes that the Department of Commerce assumed responsibility for export controls under the EPAA. *See* Exec. Order No. 11748, § 8, 38 Fed.Reg. 33575 (1973). Commerce in fact promulgated regulations, in Export Administration Bulletin No. 106 (Dec. 13, 1973) (then codified at 15 C.F.R. § 377). FEO allocation regulations expressly deferred to these export controls. 15 C.F.R. § 211.1(b)(1) (1973). *See generally* Plaintiffs' [defendants to counterclaim] Exh. No. 10 of May 30, 1977, Appendix B (Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong. 2d Sess., Alleged Political Pressure to Obtain Export Licenses for Crude Oil (Mar. 1976)).

Price regulations, however, were not affected by this delegation, and remained within the jurisdiction of the FEA. The FEA and the Cost of Living Council promul-

gated rules for the "export sales" provisions of EPAA and ESA regulations. *See* CLC Ruling 1973-3, 38 Fed. Reg. 17523 (1973); CLC Ruling 1974-3, 39 Fed.Reg. 10152 (1974); Special Rule No. 7, 41 Fed.Reg. 18646 (1976); FEA Interp. 1977-16, 42 Fed.Reg. 31151 (1977).

The use of the words "export controls" in Secretary of Commerce Dent's letter may be traced to the Export Administration Act of 1969, Pub.L.No.91-184, § 3(2) & (3), 83 Stat. 841, and the Export Administration Act of 1972, Pub.L.No.92-412, Tit. I, § 103(6), 86 Stat. 644. Section 3(2) provides, in part:

> It is the policy of the United States to use *export controls* (A) to the extent necessary to protect the domestic economy from the excessive drain of scarce materials . . . .

Pub.L.No.91-184, § 3(2), 83 Stat. 841 (emphasis added). Neither the 1969 act nor the 1972 amendments in force when Secretary Dent wrote his letter provided for regulation of price by the Department of Commerce. "Export controls" referred only to regulations "prohibit[ing] or curtail[ing] . . . exportation," *id.* § 4(b), not to price regulation. Similarly, the Export Control Act of 1949, ch. 11, §§ 2, 3, 63 Stat. 7, did not provide for price regulation. Secretary Dent proposed "moving under the authority granted [to the Department of Commerce] under the Export Control Act." This court only have [sic] referred to allocation regulations, and not price regulations.

The defendants note two amendments to export control regulations which, they argue, demonstrate that the Department of Commerce assumed jurisdiction of price as well as allocation controls. This argument is to no avail. The April 18, 1974 amendment adding 15 C.F.R. § 377.6 (d)(1)(ii)(c) dealt only with an additional requirement for an exemption from the prohibition on oil exports. The October 1, 1975 amendment, after these transactions, to that subsection, 40 Fed.Reg. 45159 (1975), was promul-

gated on the premise that price controls under the EPAA had expired. *See* 40 Fed.Reg. 40507 (1975). *See generally Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F.Supp. 162 (S.D.Ala.1976), *remanded*, 578 F.2d 1149 (5th Cir. 1978), *appeal dism'd*, 591 F.2d 711 (Em.App. 1979), *cert. denied*, 444 U.S. 879, 100 S.Ct. 168, 62 L.Ed. 2d 109 (1979). The published explanation noted "the expiration . . . of the allocation and price control systems administered by the Federal Energy Administration." 40 Fed.Reg. at 45159.

IV. Tracing Crude Oil and Product

The defendants by affidavit represented to the Department of Commerce that the products which were refined from Citronelle crude would be exported to the United States. The court finds that they were in fact exported to the United States.[1]

The task of determining the path of the product to the United States is extraordinarily complex, but not impossible. The court does not at this time have sufficient information to determine which of NEPCO's customers were affected by the alleged overcharges. An expert could, however, reach reasonable conclusions about where the product went. *See* Costikyan Dep. at 66-68; Covert Dep. at 27-28, Exhs. 12-18. *But see* Lauria Dep. (June 22, 1979) at 47 ("purely theoretical numbers").

NEPCO's customers were primarily utilities on the East Coast from Florida to Massachusetts. They included: Tampa Electric Company, Jacksonville Electric, Georgia Power Company, Public Services Gas & Electric, Virginia

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[1] Whether "the same molecules" returned to the United States, of course, is unlikely. *See* Chamberlain Testimony at 183, 187. Although the BORCO partners were credited based on specific deliveries of crude, and ran their crude separately, similar types of crude were sometimes commingled, each partner taking its share. Costikyan Dep. at 20-21, Exh. 2; Lauria Dep. (May 29, 1979) at 64; Lauria Dep. (June 22, 1979) at 33.

Electric Power, Orange & Rockland, Philadelphia Electric, Consolidated Edison, Long Island Lighting, New Bedford, and New England Gas & Electric. Costikyan Dep. at 16-27; Lauria Dep. (June 22, 1979) at 6-11. Seventy to eighty percent of NEPCO's product went to these utilities. The other twenty to thirty percent was sold to a New York retailer, Burns Brothers, New England and New Jersey retailers, and Canadian companies. Costikyan Dep. at 30-32. At some ports, deliveries were made for one customer, while in New York, for example, deliveries might be made for redelivery to a number of the utilities. *See* Lauria Dep. (June 22, 1979) at 7, 19. The Department of Energy is currently conducting an audit of NEPCO's books in an attempt to determine which customers received product from Citronelle crude. Doc. No. 109.

The type of product requested varied from customer to customer, depending upon sulphur content, pour point, and viscosity. Covert Dep. at 25.[2]

V. Other Findings

Some records maintained with regard to these transactions by NEPCO, PETCO and BORCO have been destroyed in the ordinary course of those companies' business. Costikyan Dep. at 66-68; Lauria Dep. (May 29, 1979) at 33. It appears, however, that substantial records, or the recollection of company employees, is still available. Costikyan Dep., Exh. 2; Covert Dep. at 27-28, Exhs. 12-18. The court concludes that, at this point at least, the defendants have not been substantially prejudiced by any delay on the government's part in bringing its counterclaim.

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[2] Sulphur content requirements ranged from Con Ed's 0.30% to Georgia Power's 1.00%. Citronelle crude, 0.75% sulphur, is intermediate in sulphur content. To meet customer specifications, Citronelle product was blended either with low-surphur or high-sulphur product. Costikyan Dep. at 34-39, Exh. 5; *see* Covert Dep. Exh. 12.

CONCLUSIONS OF LAW

The court has jurisdiction over the subject matter of this counterclaim pursuant to §§ 208, 209 and 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, as incorporated in § 5(a) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a), and pursuant to § 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b).

I. Limitations

The defendants contend that the government's claim for restitution under § 209 of the Economic Stabilization Act is barred by Alabama Code § 6-2-39(5), which provides for a one-year limitation on

> [a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . . .

This contention finds some support in *EEOC v. Griffin Wheel Co.*, 511 F.2d 456 (5th Cir. 1975), *clarified*, 521 F.2d 223 (5th Cir. 1975), where the court stated that a claim for back pay filed by the EEOC on behalf of employees was a "private action" subject to the statute of limitations. However, in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 366 n. 22, 97 S.Ct. 2447, 2454 n. 22, 53 L.Ed.2d 402, 411 n. 22 (1977), an enforcement action by the EEOC which included a claim for back pay (*see EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533, 537 (9th Cir. 1976), *aff'd*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977)), the Supreme Court held that a state statute of limitations would not be applied where its application would "frustrate or interfere with the implementation of national policies," or would be "inconsistent with the underlying policies of the federal statute." 432 U.S. at 367, 97 S.Ct. at 2455, 53 L.Ed.2d at 412.

The purposes expressed in § 2 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, to prevent economic

dislocations caused by oil shortages, are clearly national in scope. This court has previously stated that "the urgency and importance of the energy issue to the nation and its economy cannot be doubted." *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 420 F.Supp. 162, 170 (S.D.Ala.1976), *remanded*, 578 F.2d 1149 (5th Cir. 1978), *appeal dism'd*, 591 F.2d 711 (Em.App.1979), *cert. denied*, 444 U.S. 879, 100 S.Ct. 168, 62 L.Ed.2d 109 (1979).

Enforcement actions under the EPAA and ESA, like those under the Equal Employment Opportunity Act, are "actions brought by the federal government to vindicate combinations of private and public interests." *Marshall v. Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980) (OSHA). The Temporary Emergency Court of Appeals has held that restitution in ESA enforcement actions is "'appropriate and necessary to enforce compliance.'" *Univ. of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1070 (Em.App.1972). As an element of the government's enforcement power, a claim for restitution under the EPAA is not subject to the Alabama statute.[3]

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[3] Similarly, the Price Administrator's claim for restitution under § 205(a) of the Emergency Price Control Act of 1942 was characterized as an enforcement remedy. The court stated:

> That it operates to confer a benefit on the tenant . . . does not detract at all from the enforcement effect nor alter its nature.

Creedon v. Randolph, 165 F.2d 918, 919 (5th Cir. 1948) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)); *cf. Chris-Craft Ind., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390-91 (2d Cir. 1973) (SEC enforcement action), *cert. denied*, 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973); *S. E. C. v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

Ashland Oil Co. v. Union Oil Co., 567 F.2d 984, 989 (Em. App. 1977), cited by the defendants, is inapposite. That case was a private action for damages under § 210 of the ESA.

Occidental Life held that a claim by the government for restitution may be subject to the defense of laches. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. at 372-73, 97 S.Ct. at 2457, 53 L.Ed.2d at 415. As the court has found that the defendants have not been prejudiced by any delay, this defense has not been made out.

II. Jurisdiction

Although the government's counterclaim does not include a prayer for injunctive relief, this court nevertheless has subject matter jurisdiction of the claim for restitution. Section 209 of the ESA provides that,

> In addition to . . . injunctive relief, the court may also order restitution of moneys received in violation of any . . . order or regulation.

12 U.S.C. § 1904 note.

The defendants contend that this language demonstrates Congress' intent that federal courts have jurisdiction of a claim for restitution only when it is joined with a prayer for injunctive relief. The statute does not demand, nor does any policy of the ESA commend, such a result. *See United States v. Pro Football, Inc.*, 514 F.2d 1396 (Em.App.1975) (restitution only); *cf. Creedon v. Randolph*, 165 F.2d at 919-20 (EPCA).

Section 209 provides for three types of relief: traditional injunctions, mandatory injunctions, and restitution. The drafters employed the words "also" and "[i]n addition to" in order to give grammatical sense to the statute; the words were not intended by Congress to require that each form of relief be available and prayed for before a mandatory injunction or restitution could be granted. The legislative history of the 1971 amendments, further, indicates that Congress intended to clarify the courts' power to grant restitution, and not to limit it:

> It was not certain that, in these circumstances, there was an inherent equitable power in the court to set

> things right and order restitution. . . . This provision makes clear that the court has power to grant restitution.

S.Rep.No.507, 92d Cong., 2d Sess. (1971), *reprinted in* [1971] U.S.Code Cong. & Admin.News pp. 2283, 2291.

Section 209 authorizes an action by the government "[w]henever it appears . . . that any individual or organization *has engaged*, is engaged, or is about to engage" in a violation of the ESA. 12 U.S.C. § 1904 note (emphasis added). Ancillary equitable relief such as restitution is clearly available for a past violation of the Act. It may be the only relief available for a past violation where, as here, the allegedly unlawful activity has ceased and no injunction is available. *See, e.g., United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 334, 72 S.Ct. 690, 696, 96 L.Ed. 978, 985 (1952).

Further, the Temporary Emergency Court of Appeals has repeatedly measured the powers conferred by the ESA and EPAA "by the broad purposes of the Congressional mandate." *Bonray Oil Co. v. Department of Energy*, 472 F.Supp. 899, 904 (W.D.Okl.1978), *aff'd*, 601 F.2d 1191 (Em.App.1979). Limiting the availability of restitution as proposed by the defendants would strictly limit an enforcement tool which Congress was careful to provide for in actions under the ESA. *Cf. SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (SEC enforcement action). This court therefore concludes that the government may maintain an enforcement action for restitution in the absence of other claims for relief.

III. Liability of Defendant Chamberlain

Chamberlain is sued as a "producer" subject to price ceilings contained in 6 C.F.R. Part 150, Subpart L, and 10 C.F.R. Part 212, Subpart D. Any overcharges which he received in sales which violated the EPAA would be subject to restitution.

When a corporate officer or director is a central figure in tortious conduct, or when he authorizes, participates and approves of that conduct, he is subject to liability based upon that conduct. *L.C.L. Theatres, Inc. v. Columbia Pictures Ind., Inc.*, 619 F.2d 455 (5th Cir. 1980); *accord, Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 605-06 (3rd Cir. 1978); *Tillman v. Wheaton-Haven Rec. Ass'n*, 517 F.2d 1141 (4th Cir. 1975); *Davis H. Elliot Co. v. Carribean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 851-54 (N.D.Cal.1979); *see Restatement (Second) of Agency* § 343 (1958). This doctrine does not depend upon the same grounds as piercing the corporate veil, that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with formalities of organization. *L. C. L. Theatres, Inc. v. Columbia Pictures Ind., Inc.*, 619 F.2d at 457; *Donsco, Inc. v. Casper Corp.*, 587 F.2d at 606. Rather, the officer or director is liable as an actor, not an owner. *Id.*

Chamberlain was a central figure in the sales of crude oil by Gathering and Services. He is therefore subject to liability for any violations of the EPAA in those sales. Because restitution is predicated upon a finding of unjust enrichment, however, Chamberlain would be individually liable only to the extent that he received proceeds from those sales. *See 1* G. Palmer, *Law of Restitution*, §§ 2.1, 2.10 (1978).

IV. Violation or Exemption

The four shipments of crude oil were subject to Subchapter B, Chapter III of Title 15 of the Code of Federal Regulations, as effective on the dates of shipment. The export licenses and the amendment issued to Gathering and Services were issued pursuant to the requirements of Subchapter B, Chapter III of Title 15 of the Code of Federal Regulations. Ten C.F.R. § 211.1(b)(1), as effective

during the period from January 15, 1974 through May 30, 1974, provided:

> Exports of crude petroleum and petroleum products subject to Subchapter B of Chapter III of Title 15 of the Code of Federal Regulations are excluded from this part. [Part 211]

Petroleum prices were governed by 6 C.F.R., Part 150 from December 15, 1973 through January 14, 1974, and by 10 C.F.R. Part 212 from January 15, 1974 through May 30, 1974. Title 6, § 150.54(d)(1) provided:

> The prices charged for export sales including the sale of products to a domestic purchaser who certifies that the product is for export are exempt.

Title 10, § 212.53(a) provided:

> The prices charged for export sales of covered products including sales to a domestic purchaser which certifies the product is for export are exempt.

Whether the defendants violated the price regulations of Title 10, Part 212 depends upon the construction of the words "export" in § 211.1(b)(1) and "export sale" in § 150.54(d)(1) and § 212.53(a). If the terms are equivalent, then there was no violation because the transactions were exempted by the export licenses. If all "exports" are not "export sales," then any charges over the ceiling price would have been received in violation of the price regulations.[4]

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[4] During the relevant period, CLC, FEO, and FEA price regulations applicable to producers of crude oil established a two-tier pricing system. Under this system, a producer was required to determined a base production control level (BPCL) for each property based upon production and sale of crude oil from that property in each month of 1972. That portion of production and sale from a particular property equal to or below the BPCL was termed "old" oil and was subject to a ceiling price comprised of the "posted price" on May 15, 1973, plus $0.35 ($1.35 after December 19, 1973) per barrel. Crude oil produced and sold in excess of 1972 produc-

Section 4(b)(1)(F) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(b)(1)(F), authorizes regulations which provide for "equitable distribution of . . . refined petroleum products at equitable prices." Section 202 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, states Congress' finding

> that in order to stabilize the economy, reduce inflation . . . and protect the purchasing power of the dollar, it is necessary to stabilize prices . . . and that in order to . . . assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products.

The allocation and price regulations had been administered according to different criteria even prior to the transactions at issue. In a July 2, 1973 ruling, the Cost of Living Council stated that the purpose of the "export sale" exemption was

> to allow sales of exports which will produce revenue from foreign sources to be made at the highest price. Transactions which will not produce such revenue shall, therefore, not be considered exports for the purpose of exemption from the regulations under the economic stabilization program.

CLC Ruling 1973-3, 38 Fed.Reg.17523 (1973). A CLC ruling of March 18, 1974 is in accord. CLC Ruling 1974-3, 39 Fed.Reg. 10152 (1974). The allocation regulations in Part 211 expressly deferred to Department of Commerce determinations of what constituted an export.

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tion levels was termed "new" oil and could be sold without regard to the ceiling price imposed on "old" oil. In addition, for each month in which "new" oil was produced and sold, an equal amount of "old" oil was released from the constraints of the ceiling price ("released" oil). During all relevant times, the ceiling price of "old" oil produced from the Citronelle field was $4.10, and after December 19, 1973, $5.10 per barrel.

No such provision is found in Part 212, or in Part 150 of Title 6.

The defendants place great weight upon the letter from Commerce Secretary Dent to FEO Administrator Simon, confirming the delegation of EPAA authority, to support their argument that FEO retained no jurisdiction over price controls. In view of the confused state of the administration of the newly-enacted Emergency Petroleum Allocation and Alaskan Pipeline Acts, the question of delegation is difficult. Taken in the broadest sense, however, "control" of products to be exported may be divided among several agencies. *See, e.g.*, Export Administration Act, 50 U.S.C.App. §§ 2403-2404. The CLC's successor agencies inherited that agency's price regulations, along with at least one published ruling on the "export sales" provision. It is reasonable to conclude that the agencies contemplated that a delegation of the "export control" function might not include all controls under the EPAA. The prior history of export control statutes suggests that the term "export controls" did not include price regulations.[5]

The defendants have not suggested that the export licenses by their terms exempted the four transactions from the price controls of Title 6, Part 150 and Title 10, Part 212. They rely instead on the argument that the "export sales" provision is coextensive with the "exports" exemption of Part 212. This position finds no support in the development of the regulations in Parts 211 and 212, which had begun well before these transactions. The in-

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[5] That Commerce represented that it would fulfill "in toto" the requirements of the EPAA suggests that it did not fully comprehend the scope of that act, not that it intended to adopt price regulations. *See* Plaintiffs' [defendants to counterclaim] Exh. No. 10 of May 30, 1977 (Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Alleged Political Pressure to Obtain Export Licenses for Crude Oil (Mar. 1976)).

clusion within the term "export sales" of certain domestic transactions where the product is destined for export suggests that the two terms have different meanings.

Finally, these transactions had precisely the effect which Congress sought to avoid in enacting the EPAA. The EPAA and ESA do not call upon this court to determine whether the transactions caused a "net increase in the balance of payments," whether the alleged benefits to the Citronelle field actually accrued, or whether the transactions were a "good thing." Such a determination would be a judgment on the wisdom of the enactment itself, and is a question for Congress. The court must determine whether the transactions were exempted from pricing regulations by the export license. They were not.

The Supreme Court has cautioned, in *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968), that courts should "look at the economic reality" of transactions to determine their effect. Thus, the court held that transactions which were "exports" under other regulatory schemes were not "acts done in the course of export trade" under the Webb-Pomerene Act. 393 U.S. at 211, 89 S.Ct. at 368, 21 L.Ed. 2d at 353 (White, J., dissenting). The economic effect of the transactions in this case was higher oil prices to American buyers.

CLC, FEO and FEA price rulings follow a consistent policy of examining the substance of a transaction in applying the price regulations to export sales. *See, e.g.*, CLC Ruling 1973-3, 38 Fed.Reg. 17523 (July 2, 1973); CLC Ruling 1974-3, 39 C.F.R. 10152 (Mar. 14, 1974). The Emergency Court of Appeals has considered the regulations of these three agencies as being "carried forward" to the successor agencies. *Mobil Oil Corp. v. FEA*, 566 F.2d 87, 90 (Em.App.1977); *Marathon Oil Co. v. FEA*, 547 F.2d 1140, 1146 (Em.App.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 378 (1977).

Even assuming that the agencies' interpretive regulations were not entitled to deference, or were confusing or had made expressions contrary to the findings here, this court's findings are consistent with the intent of Congress which is apparent from the purposes of the EPAA and the ESA.

The court accordingly concludes that the four transactions violated the price regulations of 6 C.F.R. Part 150, and 10 C.F.R. Part 212, as then in force.[6]

V. Restitution

In its prayer for relief, the government requests that the court

> [e]nter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account, for subsequent distribution to NEPCO customers, a sum between $6,000,000 and $9,000,000, plus interest.

Docket No. 68, Prayer for Relief, ¶ B. The government further contends that any undistributed amounts should be paid to the United States Treasury:

> If the money could not be restored to NEPCO's customers, then it should go to either NEPCO, or if NEPCO were for some reason barred from recovery, to the United States Treasury for the benefit of its citizens generally.

Government's Brief in Support of Its Motion for Summary Judgment, filed Sept. 18, 1979, at 31 n. *.

The defendants object that there is no allegation that NEPCO customers were overcharged, that the government has failed to establish who, or whether any of the customers was injured, and that any such customers are indirect

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[6] Because of this holding the court will not consider whether the transactions constituted a "means to evade" the provisions of the regulations. *See* 10 C.F.R. § 210.62(c).

purchasers barred from recovery under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *rev'g* 536 F.2d 1163 (7th Cir. 1976), *aff'g* 67 F.R.D. 461 (N.D.Ill.1975). The government replies that a claim for restitution by its nature avoids the complexities inherent in actions for damages by indirect purchasers, and that *Illinois Brick* therefore does not apply.

The amended counterclaim does not allege specifically that NEPCO customers were overcharged, nor does it allege the disposition of unclaimed amounts as discussed in the government's briefs. The defendants' discovery and argument indicate, however, that they clearly understood that these contentions had been raised. The court will therefore treat the allegations as properly raised. *Fed.R. Civ.P.* 15(b).

The defendants urge this court to adopt as controlling in this case *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

This court does not think *Illinois Brick* should be applied to bar recovery in this action. Both *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), were private actions for damages under § 4 of the Clayton Act. Section 210 of ESA is the private action counterpart to § 4 of the Clayton Act. The clear language of § 210(b) refers to any person " 'who is found to have overcharged the *plaintiff.*' " *See Florida Power & Light Co. v. Belcher Oil Co.*, 82 F.R.D. 78, 27 F.R.Serv.2d 380 (S.D.Fla.1979) (emphasis added). That language is not present in § 209 as it does not foresee private actions or damage claims. Section 209 permits substantively and procedurally different remedies apart from damages. There are significant substantive differences between restitution and damages.[7]

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[7] "*Restitution*, which lies within that equitable jurisdiction, is consistent with and *differs greatly from the damages and penalties* . . . ." (emphasis added). *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332, 1339 (1945); *accord*

The policies underlying those cases are largely inapplicable to enforcement actions by the government, and restitutionary relief by its nature does not have some of the difficulties which arise in actions for damages.

In an enforcement action, there is no danger that the incentive to enforce the law will be reduced by permitting indirect purchasers to recover. *See Illinois Birck Co. v. Illinois*, 431 U.S. at 735, 745-47, 97 S.Ct. at 2069, 2074-75, 52 L.Ed.2d at 718, 724-26. Indeed, if the government were not permitted to represent indirect purchasers, enforcement of the ESA and EPAA would suffer. The efficient enforcement of these acts is best served by leaving actions by the government as free as possible of the constraints placed upon private plaintiffs. *Cf., e.g., General Tel. Co. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed. 2d 319 (1980) (EEOC need not satisy Rule 23 requirements).[8]

This action in any event requires an exception to *Illinois Brick*. Courts have found exceptions to the *Illinois Brick* rule where the antitrust laws would go unenforced in the absence of suits by indirect purchasers. Indirect purchasers may sue where the direct purchaser is a division or subsidiary of a violator, *see Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), and where the violator and the direct purchaser are coconspirators, *see Fontana Aviation, Inc. v. Cessna Air-*

D. Dobbs, *Handbook of the Law of Remedies* § 4.1, at 224 (1973). *See also Bowles v. Skaggs*, 151 F.2d 817, 821 (6th Cir. 1945), and compare *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971).

[8] Congress clearly intended in ESA enforcement actions not to circumscribe DOE enforcement actions. *See* part II, *supra*. Although individual damage actions under § 210 are limited to direct purchasers, *see Florida Power & Light Co. v. Belcher*, 82 F.R.D. 78, 79-80, 27 F.R.Serv.2d 380 (S.D. Fla. 1979); *Arnson v. G. M. C.*, 377 F. Supp. 209 (N.D. Ohio 1974), no such express limitations appear in § 209, which authorizes enforcement actions.

craft Co., 617 F.2d 478 (7th Cir. 1980). *See also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) ("cost-plus" contracts and "functional equivalents").

In this case NEPCO and PETCO, or the government on their behalf, would be barred from a restitutionary recovery. NEPCO and PETCO made affidavits in support of the defendants' export licenses and further supported the defendants in receiving the export licenses. This aiding and abetting the defendants in their violation of the pricing regulations for their mutual benefit should and does bar them from seeking or receiving any of the illegal profits. They are barred from recovery by their "unclean hands," as restitution is within the equitable power of the court. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332, 1339 (1945); *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309, 55 S.Ct. 713, 716, 79 L.Ed. 1451, 1457 (1935); *S. E. C. v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1971). If this court did not permit the government to sue on behalf of the indirect purchasers, the EPAA would go unenforced. Accordingly, the court holds that the action on behalf of indirect purchasers is not barred by *Illinois Brick*.

Illinois Brick raised a second policy to bar actions by indirect purchasers. The court was concerned with the evidentiary burden placed upon courts by attempts to apportion a recovery among different levels in a chain of distribution. *Illinois Brick Co. v. Illinois*, 431 U.S. at 737-45, 97 S.Ct. at 2070-74, 52 L.Ed.2d at 719-24; *see Hanover Shoe Co. v. United Shoe Mach. Corp.*, 392 U.S. at 491-93, 88 S.Ct. at 2230-31, 20 L.Ed.2d at 1241. An apportionment of injury must be considered in this case to ensure that this court's equitable remedy is fair. NEPCO's customers were mostly utilities, which probably passed on all or part of their portions of the overcharges

to their residential, industrial and commercial customers. Indeed, common knowledge of how electricity is distributed and used makes this probable. The claims of these customers to a share of the recovery could not be ignored.

The principal thrust of restitution has been to force the wrongdoer to "disgorge benefits that it would be unjust for him to keep." D. Dobbs, *Remedies* § 4.1 at 224 (1973); G. Palmer, *Law of Restitution* § 2.6, at 82 (1978); *see Bloomgarden v. Coyer*, 479 F.2d 201, 211 (D.C.Cir.1973). Consistent with the equitable nature of the remedy, courts have been flexible in ensuring that the defendant disgorge his illegal gain, and have not always required payment to individual injured parties. Thus, in *Oakland Raiders v. Office of Emergency Preparedness*, 380 F.Supp. 187 (N.D. Cal.1974), the court ordered restitution by a prospective reduction of ticket prices to the extent that ticket purchasers were not identifiable. In *United States v. Pro Football*, 514 F.2d 1396, 1402 (Em.App.1975), the court ordered restitution only to those who presented ticket stubs, because of the defendant's good faith. A line of cases from the District of Columbia Circuit provides that, where the return of overcharges to persons who paid is not feasible, the transit company would be required to establish a fund to benefit transit users. *Bebchick v. Pub. Util. Comm'n*, 318 F.2d 187, 203 (D.C.Cir.1963), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); *see Democratic Cent. Comm'n v. Wash. Metro. Area Transit Comm'n*, 485 F.2d 786, 826-28 (D.C.Cir. 1973); *Williams v. WMATC*, 134 U.S.App.D.C. 342, 415 F.2d 922, 956-57 (D.C.Cir.1968), *cert. denied sub nom. D. C. Transit System v. Williams*, 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969).

Because of the difficulty of apportioning a recovery, should the tort-feaser defendants be permitted to benefit from their profiteering? Should the complexity of the oil industry, or of the industrial and commercial institutions that transact the vast majority of business activity in the

United States in similar situations, profit from the complexity of determining the injury to each of thousands or millions of the public consumers?

This court thinks not. Equity has been the conscience of the courts. Quite frankly, this court cannot envision a formula which could make a meaningful distribution to the millions of consumers from Florida to Massachusetts who purchased power or goods or services made or supplied from NEPCO's customers. NEPCO made sales to twelve or more utilities and retailers along the Atlantic seaboard from Florida to Massachusetts. Restitution, an equitable remedy available in this case, is sufficiently flexible to prevent such a result.[9]

It is clear these profits have no character as punishment, but consist of only the overcharged revenues that the defendants were never legally entitled to receive. These defendants have violated the statute and have been unjustly enriched at the expense of all the direct and indirect customers of NEPCO and PETCO. They should not be permitted to keep these gains. *Restatement of Restitution* § 3 (1937). It would be unconscionable to find the defendants in violation of the statute and yet hold that since the task of determining to whom the refunds should go is so formidable that the defendants be permitted to keep their ill-gotten gains. Congress intended such profits to be disgorged by authorizing "restitution." To limit restitution to refunds to those to whom "damage" can be proved would destroy the purpose of the price control regulations and the authorized action by the government under § 209 to seek restitution.

This court concludes that in order to deprive the defendants of their illegal gain, restitution should be made to the

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[9] *See In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974), an antitrust case, class treatment was not permissible. A meaningful recovery was precluded since each claim was too small to warrant private action.

United States Treasury. Because of the difficulties involved, no attempt will be made to apportion the recovery among the various levels of distribution injured by the defendants' violations. Realistically this holding very simply means that, since the people are sovereign, and where large numbers, here millions, have been injured, the peoples' institution, the United States government, will recover the disgorged wrongful profits.[10]

The government has demonstrated injury to a class of persons. As the District of Columbia Circuit has noted,

> The law of class recovery is in flux. The courts are ready to apply bases of recovery with reasonable liberality in order to serve the objectives of the law.

Bangor & Aroostock R. R. v. Bhd. of Locomotive Firemen & Enginemen, 442 F.2d 812, 821 (D.C.Cir.1971). To deny recovery in this case would result in an irremediable violation. The doctrine of restitution, however, is sufficiently flexible to avoid this result.

Such a disposition of the recovery does not constitute an "unauthorized penalty." In *Huntington v. Attrill*, 146 U.S. 657, 668-69, 13 S.Ct. 224, 228, 36 L.Ed. 1123, 1128 (1892), the Court noted:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently

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[10] *See Hodgson v. Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971); *Hansen v. United States*, 340 F.2d 142 (8th Cir. 1965), restitution cases which point the way where recovery has been placed on deposit with the United States Treasury, not subject to the wrongdoer's claims.

> termed *civil injuries;* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*"

The essence of a penalty is punishment for an offense committed against the state. *Id.* at 666-69, 13 S.Ct. at 226-28, 36 L.Ed. at 1127-28. Three factors have been distilled from *Huntington* and later cases to distinguish penal and remedial forms of relief:

> "(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether the recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered."

In re Wood, No. 79-1504, slip op. at 8758 (5th Cir. Aug. 22, 1980) (quoting *Murphy v. Household Finance Corp.*, 560 F.2d 206, 209 (6th Cir. 1977)).

As to the first factor this court finds that like most modern consumer remedies § 209 has a dual purpose. On the one hand it is aimed at remedying harm to the individual who could not practically protect himself from violations by allowing the government to enforce the law for the individual's benefit. On the other hand, § 209 seeks to deter prohibited business practices for the good of the general public. Even so, its purpose is not primarily punishment for an infraction of a public law. *See Porter v. Household Finance Corp.*, 385 F.Supp. 336, 342-43 (S.D. Ohio 1974). The first factor therefore indicates that restitution as ordered herein is not penal.

The third factor likewise indicates that the restitution ordered herein is not penal. The amount of restitution is equal to the amount of the illegally obtained profits, and is not at all disproportionate to the harm suffered.

The second factor, taken in the abstract, weighs in favor of characterizing this relief as penal. That the relief flows to the government does not of itself, however, compel the conclusion that it is penal in nature. The Fifth Circuit has noted the necessity to re-evaluate *Huntington* in light of modern business practices and the complexity of the economy. In *In re Wood*, the court stated:

> Candidly acknowledging that TILA [Truth in Lending Act] liability under section 130 "does not fall neatly within the common law categories of either a penalty or a remedial action for injury to property or monetary interest," *id.* at 342, the court concluded that the primary purpose of section 130, *a type of social welfare legislation unknown at the time of Huntington, is remedial . . . .*" (Emphasis added).

In re Wood, No. 79-1504, slip op. at 8758 (citing *Porter v. Household Finance Corp.*, 385 F.Supp. 336 (S.D.Ohio 1974)). The relief flows to the government in this case because it cannot flow to the wronged individuals and because permitting the retention of the illegal overcharges would utterly frustrate the purposes of the EPAA. It is clearly "authorized" under § 209 of the ESA; an analysis of the factors of *In re Wood* demonstrates that it is not a penalty.

VI. Penalty

The assessment of a penalty in this action requires a finding that the defendants "willfully" violated the FEA pricing regulations. Economic Stabilization Act, § 208, 12 U.S.C. § 1904 note. The court has found that the defendants sought the advice of counsel before proceeding with their transactions. The defendants made a good faith effort to comply with the regulations, and clearly and fully explained their transaction to the Department of Commerce.

It is clear that any violation proceeded from the inexperience of the agencies in administering the new regula-

tions, and the unusual time constraints under which they were placed. The regulations contained no examples which might have alerted the defendants that they came within the terms of one regulation, but not of the other.

Accordingly, no penalties will be assessed.

VII. Amount of Recovery

The court is unable to determine from the evidence the amount of restitution to be made. The parties will accordingly be permitted the opportunity to enter a stipulation, failing which, to file appropriate motions.

APPENDIX F

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. 11-7 & 11-8

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
PLAINTIFFS/COUNTERCLAIM-DEFENDANTS,
APPELLEES, and CROSS-APPELLANT,

v.

JOHN S. HERRINGTON and MALCOLM BALDRIDGE,
DEFENDANTS, APPELLANTS, and CROSS-APPELLEES,

and

UNITED STATES OF AMERICA,
COUNTERCLAIM-APPELLANT and CROSS-APPELLEE.

Before: GIGNOUX, GRANT and PECK, Judges.

ORDER

Upon consideration of Plaintiffs-Appellees' petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that said petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The Court's mandate shall issue seven days from the date of this order—Tuesday, June 30, 1987.

FOR THE COURT:

CYNTHIA A. DYKES
Clerk

By /s/ Sharon A. Krosel
SHARON A. KROSEL
Chief Deputy Clerk

June 23, 1987